95-1659

NO.

Supreme Court, U.S.
FILED
FEB 22 1996
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JERRY DALE LOWE, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

Petition Writ of Certiorari to
the United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Rebecca A. Baitty
Rebecca A.Baitty, P.A.
9 Fillmore Drive
Sarasota, FL 34236
(941) 388-3400
Counsel for Petitioner

7pp

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE FOURTH CIRCUIT'S RULING IN THIS CASE EXPANDS THE SCOPE OF 18 U.S.C. § 33 FAR BEYOND THE CAREFUL LIMITS DRAWN BY CONGRESS, BY EFFECTIVELY DELETING THE STATUTORY REQUIREMENTS THAT THE VEHICLE BE USED *IN* INTERSTATE COMMERCE, AND FOR THE COMMERCIAL TRANSPORTATION OF PASSENGERS, PROPERTY OR CARGO

II. WHETHER THE FOURTH CIRCUIT'S RULING UNDULY RESTRICTS THE HEARSAY EXEMPTION OF RULE 801(d)(1)(B) OF THE FEDERAL RULES OF EVIDENCE BY HOLDING, CONTRARY TO THE THE RULINGS OF OTHER COURTS OF APPEALS, THAT A PRIOR CONSISTENT STATEMENT IS ADMISSIBLE ONLY FOLLOWING AN EXPRESS IMPEACHMENT OF THE DECLARANT

III. WHETHER THE FOURTH CIRCUIT'S APPLICATION OF RULE 804(b)(3) OF THE FEDERAL RULES OF EVIDENCE CREATES AN UNREASONABLY HIGH THRESHHOLD FOR THE INTRODUCTION OF A WITNESS' CORRABORATED STATEMENT AGAINST INTEREST WHICH ALSO EXCULPATES THE DEFENDANT

IV. WHETHER THE COMPETENT EVIDENCE IN THIS CASE IS SUFFICIENT TO SUPPORT PETITIONER'S CONVICTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

OPINION BELOW 1

STATEMENT OF JURISDICTION 1

STATUTES INVOLVED 1

STATEMENT OF THE CASE 4

ARGUMENT 7

I. THE FOURTH CIRCUIT'S OPINION EXPANDS THE SCOPE OF § 33 FAR BEYOND THE CAREFUL LIMITS DRAWN BY CONGRESS 7

A. THE FOURTH CIRCUIT OPINION NULLIFIES CONGRESS' RESTRICTION OF SECTION 33 TO VEHICLES USED IN THE COMMERCIAL TRANSPORTATION OF PASSENGERS, PROPERTY OR CARGO 9

B. THE FOURTH CIRCUIT RULING NULLIFIES CONGRESS' RESTRICTION OF SECTION 33 TO VEHICLES "USED, OPERATED OR EMPLOYED IN INTERSTATE COMMERCE" 12

C. THE FOURTH CIRCUIT OPINION TRANSFORMS SECTION 33 INTO A POWERFUL TOOL FOR FEDERAL POLICING OF LOCAL LABOR DISPUTES, CONTRARY TO THE EXPRESSED INTENT OF CONGRESS 18

II. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN PETITIONER'S CONVICTION 23

III. THE COURT OF APPEALS IMPROPERLY AFFIRMED THE DISTRICT COURT'S REFUSAL TO ADMIT EVIDENCE THAT LOWE NO LONGER HAD POSSESSION OF THE WEAPON AT THE TIME OF THE SHOOTING 27

CONCLUSION 33

TABLE OF AUTHORITIES

CASES

Barrett v. United States,
423 U.S. 212 14

Beech Aircraft Corp. v. Rainey,
488 U.S. 153, 109 S. Ct. 439, 102 L. Ed. 2d 445 (1988) 28

In United States v. Monholland,
607 F.2d 1311 (10th Cir. 1979) .....

National Labor Relations Board v. Reliance Fuel Oil Corp.,
371 U.S. 224, 83 S. Ct. 312, 9 L. Ed. 2d 279 (1963) 13

Perez v. United States,
402 U.S. 146, 91 S. Ct. 1357, 28 L. Ed. 2d 686 (1971) 13-14

Russell v. United States,
471 U.S. 858, 105 S. Ct. 2455, 85, L. Ed. 2d 829 (1985) 13

Scarborough v. United States,
431 U.S. 563, 97 S. Ct. 1963, 52 L. Ed. 2d 582 (1977) 13

United States v. American Building Maintenance Industries,
422 U.S. 271, 95 S. Ct. 2150, 45 L. Ed. 2d 177 (1975) ... 13-14, 18

United States v. Bass,
404 U.S. 336, 92 S. Ct. 515, 30 L. Ed. 2d 488 (1971) 19

United States v. Casoni,
950 F.2d 893 (3d Cir.1991) 28

United States v. Daniels,
948 F.2d 1033 (6th Cir. 1991) 18

United States v. Enmons,
410 U.S. 396, 93 S. Ct. 1007, 35 L. Ed. 2d 379 (1973) 19-22

United States v. Gullett,
___ *F.3d* ___, 1996 U.S. App. LEXIS 2027(4th Cir. 1996) 20

United States v. Heightland,
865 F.2d 94 (6th Cir. 1989) 18

United States v. Lambert,
994 F.2d 1088 (4th Cir. 1993) 18

United States v. Lopez,
___ U.S. ___, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995) 13, 18

Daubert v. Merrell Dow Pharmaceuticals, Inc.,
___ U.S. ___, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) 25

United States v. Voss,
787 F.2d 383 (8th Cir. 1986) 16

U.S. v. Montague,
958 F.2d 1094, 294 U.S. App. D.C. 236 29

STATUTORY MATERIALS

18 U.S.C. § 10 14

18 U.S.C. § 31 ..... 1, 6, 9

18 U.S.C. § 32 ..... 10, 14

18 U.S.C. § 33 ..... *passim*

18 U.S.C. § 34 6

18 U.S.C. §844(i) 13, 15

18 U.S.C. § 924 ..... 3, 6

18 U.S.C. § 1992 14

28 U.S.C. § 1254(1) 1

32 Cong. Rec. S4337-01 (daily ed. April 16, 1986) 21

Conf. Rep. No. 84-2287, 84th Cong., 2d Sess. (1956), *reprinted in* 1956 U.S.C.C.A.N. 3150 11

H.R. Rep. No. 1979, 84th Cong., 2d Sess. (1956), *reprinted in* 1956 U.S.C.C.A.N. 3145 ..... 11, 14

S. Rep. No. 225, 98th Cong., 1st Sess. (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3500 12

Fed. R. Evid. 801 27-29

Fed. R. Evid. 804 30

MISCELLANEOUS

47 A.L.R. Fed. 639-651 28

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 65 F.3d 1137 (1995), and also is set forth in the Appendix to the Petition at 1. Record citations in this Petition are to the pages of the Joint Appendix submitted to the Court of Appeals.

STATEMENT OF JURISDICTION

Petitioner's conviction for violations of 18 U.S.C. §§ 33 and § 924(c)(1) was affirmed by the United States Court of Appeals for the Fourth Circuit on September 20, 1995. The Court of Appeals denied his Petition for Rehearing on November 24, 1995.

This Court's jurisdiction to review the decision of the Court of Appeals is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

18 U.S.C. § 31. Definitions

When used in this chapter the term--

"Aircraft engine", "air navigation facility", "appliance", "civil aircraft", "foreign air commerce", "interstate air commerce", "landing area", "overseas air commerce", "propeller", "spare part" and "special aircraft jurisdiction of the United States" shall have the meaning ascribed to those terms in sections 40102(a) and 46501 of title 49.

"Motor vehicle" means every description of carriage or other contrivance propelled or drawn by mechanical power and used for commercial purposes on the highways in the transportation of passengers, passengers and property, or property or cargo;

"Destructive substance" means any explosive substance, flammable material, infernal machine, or other chemical, mechanical, or radioactive device or matter of a combustible, contaminative, corrosive, or explosive nature;

"Used for commercial purposes" means the carriage of persons or property for any fare, fee, rate, charge or other consideration, or directly

or indirectly in connection with any business, or other undertaking intended for profit;

"In flight" means any time from the moment all the external doors of an aircraft are closed following embarkation until the moment when any such door is opened for disembarkation. In the case of a forced landing the flight shall be deemed to continue until competent authorities take over the responsibility for the aircraft and the persons and property on board; and

"In service" means any time from the beginning of preflight preparation of the aircraft by ground personnel or by the crew for a specific flight until twenty- four hours after any landing; the period of service shall, in any event, extend for the entire period during which the aircraft is in flight.

18 U.S.C. § 33. Destruction of motor vehicles or motor vehicle facilities

Whoever willfully, with intent to endanger the safety of any person on board or anyone who he believes will board the same, or with a reckless disregard for the safety of human life, damages, disables, destroys, tampers with, or places or causes to be placed any explosive or other destructive substance in, upon, or in proximity to, any motor vehicle which is used, operated, or employed in interstate or foreign commerce which is used, operated, or employed in interstate or foreign commerce, or its cargo or material used or intended to be used in connection with its operation; or

Whoever willfully, with like intent, damages, disables, destroys, sets fire to, tampers with, or places or causes to be placed any explosive or other destructive substance in, upon, or in proximity to any garage, terminal, structure, supply, or facility used in the operation of, or in support of the operation of, motor vehicles engaged in interstate or foreign commerce or otherwise makes or causes such property to be made unworkable, unusable, or hazardous to work or use; or

Whoever, with like intent, willfully disables or incapacitates any driver or person employed in connection with the operation or maintenance of the motor vehicle, or in any way lessens the ability of such person to perform his duties as such; or

Whoever willfully attempts to do any of the aforesaid acts--

shall be fined not more than $10,000[1] under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 924(c)

(c)(1) Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, to imprisonment for ten years, and if the firearm is a machine gun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machine gun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried.

---

[1]A 1994 amendments struck out "not more than $10,000" and inserted "under this title" following "shall be fined". Pub.L. 103-322, Title XXXIII, § 330016(1)(L), 108 stat. 2147.

STATEMENT OF THE CASE

In the spring of 1993, the United Mine Workers of America [hereinafter "UMWA"] began a strike against Arch of West Virginia [hereinafter "Arch"] at its Ruffner Mine in Logan County, West Virginia (JA 275-76; 280; 299-306; 363; 391; 447-48; 826). Arch is a division of Apogee Coal Company, a Delaware corporation engaged in the business of mining and selling coal in interstate markets (JA 511).

Arch's regular, "in house" security was provided through contract with Black Hawk Security, a West Virginia company which offered "escort service, security services, armed and unarmed, bodyguard services" (JA 447). Arch also employed Elite Security, a North Carolina corporation, to provide extra protection for its personnel and equipment, at the Ruffner Mine only, for the duration of the strike (JA 429). Elite brought guards from other states to West Virginia to work at the Ruffner site. Arch provided vehicles for use of the Elite guards, including trucks reinforced with bullet resistant Lexan (JA 516).

There was no evidence that any coal was mined or shipped at the Ruffner site for the duration of the strike. However, Arch contracted with Deskins Contracting, a West Virginia company owned by Russell Deskins, to clean a sediment pond at the mine during this period (JA 503; 513). Arch previously had received "either a warning or ... a citation to clean the sediment pond" by a state environmental inspector, and the mine was subject to closure if it received three citations for the same condition in one year (JA 513-14).

Deskins' workers were provided through a subcontract with Earth Movers, Inc., an apparently related West Virginia corporation whose sole purpose was to provide workers for Deskins (JA 491). Although both Deskins and Earth Movers served some clients in the state of Kentucky, their work for Arch was limited to the Ruffner site and had no interstate component (JA 517).

Two Deskins workers, Marion Hensley and Eddie York, began work on the environmental clean-up on July 22, 1993 (JA 475-76). They traveled to the sediment pond in separate pickup trucks (JA 478), both titled in West Virginia in the name of Russell Deskins (JA 493), and began cleaning the pond, using heavy equipment which had been brought to the site earlier that day.

The union had stationed pickets near the entrance to the Ruffner mine located on Slab Fork Hollow Road (JA 275; 281; 826). On the

afternoon of July 22, 1993, the group of picketers at the mine site totaled at least thirteen, including five miners from the day shift who had remained after their shift was over, and six miners who had arrived to begin their assignments on the evening shift (JA 308; 394). At least two other miners -- the Petitioner Jerry Dale Lowe, who was working an extra shift in order to get another day off, and the local union president Earnest Woods -- also were present at the picket site. Various witnesses indicated that other, unidentified miners also were present at the site (JA 302; 308; 366-67; 370; 404; 409; 414).

Between 4:00 and 5:00 p.m., two vehicles owned by Arch and driven by Elite Security guards passed the picket site, on their way up Slab Fork Hollow Road to examine the mine site and make plans for the evening's security, and to escort Hensley and York off of the mine site (JA 430-31). One vehicle, a blue Ford Bronco, was driven by Larry Kopplin, the site commander for the Elite guards (JA 432); another Elite supervisor also was in the vehicle (JA 431). The second vehicle was a white, crew cab pickup, reinforced with Lexan driven by James Richardson, an Elite guard; its passengers were another Elite guard and the owners of both Elite Security and Black Hawk Security (JA 431).

As the security vehicles drove up the hollow past them, the picketers heard a loud noise, apparently a shot, originating from the guard vehicles (JA 310; 402; 771; 827). Earnest Woods, the local union president, also saw the driver of one of the guard vehicles open his door, step out with one foot "and put a shot off" (JA 309-10; 771). Woods was convinced that the guard had fired the shot "[t]o provoke us, to get something on film" from the video cameras the guards always carried (JA 315). He and the other miners were angry about this incident, as well as a pattern of verbal harassment by the guards (JA 285). Woods joined some of the other miners , "talked about the guard shooting when he pulled in" and told the others that he "intended to rock his vehicle when he come out of there for shooting" (JA 314-15).

Soon afterwards, the group of miners began to break up. Woods went into the tall weeds along the road, put on a mask, and waited for the trucks to return (JA 317). Most, if not all, of the other miners did likewise (JA 317). Petitioner Lowe crossed the road and took up a position down a steep bank, a few feet from a nearby creek (JA 772-75).

At approximately 5:30 p.m., shortly after the miners disbursed, the two guard trucks returned down Slab Fork Hollow Road, flanking the Deskins pickup trucks driven by Hensley and York. Kopplin, in the Ford

Bronco, led the convoy and was followed by York and then Hensley (JA 435). The Lexan-reinforced white Chevrolet Club Cab driven by Richardson was at the end (JA 435).

As the trucks approached the picket area, they were hit by numerous rocks. Contemporaneously with the rock throwing, the occupants of the trucks heard gunshots (JA 480). York's truck suddenly speeded up, veered off the road and came to rest in a ditch on the left side of the road (JA 455). It later was discovered that a bullet had entered his truck's back window and struck York in the back of the head, killing him instantly (JA 456; 522; 601).

A federal grand jury indicted Lowe, together with seven fellow union members, in a four count indictment returned on November 2, 1993 (JA 13). All of the counts were based upon alleged violations of 18 U.S.C. § 33, which provides for penalties of up to twenty years in prison, or the death penalty, 18 U.S.C. § 34, for anyone who intentionally or recklessly "damages, disables [or] destroys any motor vehicle which is used, operated, or employed in interstate or foreign commerce... or ... disables or incapacitates any driver . . .of the motor vehicle."[2] Shortly before trial, the federal charges against Lowe's seven co-Defendants were dismissed pursuant to their agreements to enter guilty pleas in state court to a single count information charging them with destruction of property, and to testify at Lowe's trial. They each received a sentence of 120 days in jail and a $500.00 fine, together with court costs and restitution (JA 298; 364-65; 392-94).

Petitioner Lowe was tried before a jury on June 13-24, 1994 (JA 194). Beginning with a pre-trial motion to dismiss (JA 36-49), Petitioner challenged the Government's assertion that the vehicles involved in the July 22 incident were "used, operated or employed in interstate commerce. . . in the transportation of passengers, passengers and property, or property or cargo" as required by 18 U.S.C. §§ 31 and 33. The district

---

[2]The first two counts, a conspiracy charge and a substantive count, charged all eight defendants with damaging motor vehicles alleged to have been "used, operated and employed in interstate commerce," based upon their admitted actions in throwing rocks at the trucks on July 22 (JA 13-19). Count III charged Petitioner Lowe alone with violating § 33 by disabling Eddie York, allegedly the driver of a vehicle "used, operated and employed in interstate commerce" (JA 20). Count IV charged Lowe with using a firearm in the commission of the Section 33 offense, in violation of 18 U.S.C. § 924(c)(1) (JA 21). The Government never contended that Lowe had intentionally killed York, but alleged that he had fired shots in the direction of the vehicles, with reckless disregard for human life (JA 63; 170; 263; 962).

court repeatedly expressed concern with the Government's theory that this jurisdictional predicate was established by evidence that the vehicles were being used for the "transportation of providers of services" (JA 905-06; 911-912; 942-43).

Following extensive arguments on this issue, the district court ultimately submitted the case to the jury on a theory it fashioned itself. Under the instructions drafted by the court on the last day of trial, the jurisdictional prerequisite could be established by evidence that:

> [t]he trucks being driven by employees of Elite Security and Deskins Contracting were used or employed by Arch of West Virginia in connection with and in furtherance of its business of distributing coal mined in West Virginia to consumers in another state, or used or employed by Elite Security in connection with and in the course of conducting its business of providing security services outside the State of North Carolina (JA 1031-32).

After three full days of deliberations, the jury convicted Lowe on all counts. He was sentenced to seventy-one (71) months imprisonment on the Section 33 counts, with a consecutive sixty (60) month term on the firearm charge, for a total of nearly eleven years imprisonment, together with a fine and restitution (JA 176-77).

The Court of Appeals for the Fourth Circuit affirmed, with one judge dissenting, and subsequently denied Lowe's Petition for Rehearing and Suggestion for Rehearing En Banc.

ARGUMENT

I. THE FOURTH CIRCUIT'S OPINION EXPANDS THE SCOPE OF § 33 FAR BEYOND THE CAREFUL LIMITS DRAWN BY CONGRESS

The Fourth Circuit's affirmance of Lowe's conviction marks the first time that § 33 -- a statute clearly designed to punish violence against vehicles engaged in the interstate, commercial transportation of passengers, property or cargo -- has been used to police an essentially local labor dispute, based upon damage to a vehicle and driver engaged in purely intrastate activities. As the dissenting judge observed:

> An employee of a West Virginia company, driving a truck, without passengers or cargo, that was titled in West Virginia and owned by his West Virginia employer, was fatally shot as he was leaving a West Virginia coal mine to return to his employer's West Virginia shop. Principal responsibility for this tragedy was attributed to Petitioner Jerry Dale Lowe. But Lowe was not charged with murder, manslaughter, felonious wounding, assault, battery, or any other seemingly appropriate state law offense. Instead, he was charged with, and convicted of, violating a federal statute aimed at punishing those who damage commercial vehicles used in interstate commerce.

United States v. Lowe, 65 F.3d 1137, 1148 (4th Cir. 1995, Motz, dissenting); App-21.

The structure of the statute at issue is relatively simple. Section 33 itself provides penalties for attacks on "any motor vehicle which is used, operated, or employed in interstate or foreign commerce." Section 31 defines "motor vehicle" as a vehicle "used for commercial purposes on the highways *in the transportation of passengers, passengers and property, or property or cargo*," and defines the phrase "used for commercial purposes," as meaning "*the carriage of persons or property* . . . directly or indirectly in connection with any business, or other undertaking intended for profit."

Neither of the two requisites of the statute were satisfied in this case. The vehicle in which York was killed was neither "used, operated, or employed in interstate or foreign commerce," nor used "in the transportation of passengers, ... property or cargo."

Nevertheless, the Court of Appeals for the Fourth Circuit upheld Lowe's conviction, over the dissent of Judge Motz, ruling that "[a]ll the statute requires is that . . .vehicles must be used *in connection with or in furtherance of* the interstate market activities of the entities operating or employing the vehicles." *Lowe*, *supra* at 1147; App-18. The Court of Appeals also ruled that the statutory requirement that the vehicle in which York was killed be used "in the transportation of passengers, passengers and property, or property or cargo" was satisfied because York himself; the driver and sole occupant of the vehicle, was a "passenger."

The Fourth Circuit's construction of the statute is unprecedented, and ignores both the language and the legislative history of § 33. As

Judge Motz's dissent notes, the opinion employs a carefully and narrowly drawn statute to extend federal criminal jurisdiction over "every vehicle owned by a person or entity engaged in interstate commerce, no matter how confined the use of the vehicle, because conceivably every such vehicle somehow 'furthers' the interstate market activities of its owner." *Id.* at 1150; App-25. The Court's opinion also transforms § 33 into a powerful tool for federal policing of local labor disputes, contrary to the expressed intent of Congress. The nature and scope of the Court of Appeals' error justifies review by this Court.

A. THE FOURTH CIRCUIT OPINION NULLIFIES CONGRESS' RESTRICTION OF SECTION 33 TO VEHICLES USED IN THE COMMERCIAL TRANSPORTATION OF PASSENGERS, PROPERTY OR CARGO

In enacting § 33, which punishes attacks on "any motor vehicle which is used, operated, or employed in interstate or foreign commerce," Congress carefully limited the scope of the statute by adopting a restrictive definition of "motor vehicle." The statute's definitional section, 18 U.S.C. § 31, provides:

> 'Motor vehicle' means every description of carriage or other contrivance propelled or drawn by mechanical power and used for commercial purposes on the highways *in the transportation of passengers, passengers and property, or property or cargo.*
>
> 'Used for commercial purposes' means *the carriage of persons or property* for any fare, fee, rate, charge or other consideration, or directly or indirectly in connection with any business, or other undertaking intended for profit. 18 U.S.C. § 31 (emphasis added).

Thus, the statutory language clearly requires that the vehicle at issue be used commercially to transport "passengers, passengers and property, or property or cargo." The legislative history of § 33 confirms this limited scope of the statute. The Fourth Circuit's opinion effectively nullifies this requirement.

The Court of Appeals did not suggest that any of the vehicles at issue in this case were used to transport "property or cargo." The Court affirmed Petitioner's conviction on the basis that "each of the vehicles was used 'in the transportation of passengers'" *Id.* at 1143; App-9. However,

the Deskins vehicles, including the one in which York was killed, were occupied solely by their respective drivers, who were simply returning from the mine site to the Deskins shop, on their own time.[3] The only occupants of the Elite vehicles were security guards on a local trip to the mine site "to look over the area to set up security for that evening" (J.A. 431-32) and to escort the Deskins vehicles off of the property (J.A. 450, 453). Nevertheless, the Court of Appeals held that all of the vehicles were being used to "transport passengers":

> The Elite vehicles were used to escort the Deskins employees from the waste area to a safe point outside the mine, and the vehicles used by Deskins were used to transport workers for Deskins from the waste area to a safe point outside the mine. Thus, the vehicles in the convoy were "motor vehicles" within the meaning of the statute.

Lowe, supra at 1143; App-9.

The fallacy of the Court's decision is most apparent in its conclusion that the Deskins vehicles were used 'in the transportation of passengers.'" As the dissenting judge observed:

> It was undisputed that the Deskins vehicles--including the one containing the victim who was fatally shot--contained only one person, the driver himself. At least with regard to the Deskins vehicles then, there cannot be any claim that any passengers were transported for any purpose, let alone for commercial purposes. By definition, drivers are not passengers.

Lowe, supra at 1149 (Motz, dissenting); App-22.

Indeed, the history of § 33 unmistakably demonstrates that the statute does not apply to vehicles carrying only a driver, with no "property or cargo."

The original House Bill which led to the enactment of § 33 in 1956 applied only to attacks or threats against commercial aircraft, provisions which now are codified in 18 U.S.C. § 32. The corresponding

---

[3]Hensley and York, the Deskins employees, were paid on an hourly basis. A Deskins manager testified that in "many of the jobs we do, we do work in places that are pretty far from our shop. So what we do is we pay the employees from the time they leave the shop until the time they return that evening, whenever." (J.A. 493). However, Manion Hensley, the surviving Deskins driver, testified without contradiction that he and York were no longer being paid at the time of the attack, which occurred on their return from the Arch site to the nearby shop. (J.A. 483-486).

Senate Bill, which was adopted in conference, extended the statute's protection to motor vehicles "used [in interstate commerce] for commercial purposes on the highways *in the transportation of passengers, or passengers and property.*" *See* H.R.Rep. No. 1979, 84th Cong., 2d Sess. (1956), *reprinted* in 1956 U.S.C.C.A.N. 3145. The Conference Report emphasized the extraordinarily limited scope of the statute's application:

> The one issue of concern at the conference was the interpretation of the scope of the term 'motor vehicle' as defined in the bill. It was agreed that the term 'motor vehicle' means every description of carriage or other contrivance propelled or drawn by mechanical power and used for commercial purposes on the highways. *It does not extend to motor vehicles, including commercial motor vehicles, used merely for the transportation of property, or for personal or private purposes.* Conf. Rep. No. 84-2287, 84th Cong., 2d Sess. (1956), *reprinted in* 1956 U.S.C.C.A.N. 3150 (emphasis added).

The Fourth Circuit's interpretation of the term "passengers" to include the driver himself clearly is inconsistent with congressional intent. The conference report unequivocally states that a vehicle is not used "in the transportation of passengers, or passengers and property" when it is "used merely for the transportation of property," although such a vehicle necessarily would have a driver. Thus, Congress drew a clear distinction between "passengers" and drivers.

The sole amendment to the statute since its enactment in 1956 reinforces this distinction. In 1984, Congress expanded the definition of motor vehicle to include a vehicle used for commercial purposes on the highways in the transportation of "property or cargo." The Senate Report on the bill noted that "[t]he phrase 'property or cargo' is added to cover trucks," and explained the need for the amendment:

> Present federal law, 18 U.S.C. 33, covers the destruction or damage of motor vehicles if done with the intent to endanger the safety of anyone on board. The term motor vehicle is defined as a conveyance used on the highways for commercial purposes in the 'transportation of passengers or passengers and property.' *Thus, section 33 does not reach the destruction or damage of a truck*

> *which carriers only cargo, not passengers.* Another statute proscribes the actual or attempted destruction of cargo moving in interstate commerce, but is limited to the cargo itself, not the truck. Thus, *there is no federal statute proscribing, for example, the shooting at a truck and damaging it with intent to hurt or kill the driver.* S. Rep. No. 225, 98th Cong., 1st Sess. (1983) *reprinted in* 1984 U.S.C.C.A.N. 3182, 3500 (emphasis added).

Again, the intent of Congress to exclude drivers from the definition of passengers is unmistakable. The drafters of the 1984 amendment added "property or cargo" precisely because the existing statute did not reach "the destruction or damage of a truck which carriers only cargo, not passengers," and thus did not proscribe "the shooting at a truck and damaging it with intent to hurt or kill the driver." The Fourth Circuit's interpretation, expanding the definition of "passengers" to include the driver himself, renders the 1984 amendment superfluous.

The Court of Appeals' application of the statute to cover the Elite vehicles is no more persuasive. As the dissent emphasized:

> [A]lthough the Elite vehicles contained several Elite employees, there was no evidence that they were ever used to provide commercial transportation for Deskins employees or anyone else. The legislative history of § 33 strongly suggests that it was not intended to apply to vehicles in which employees of the vehicle owner were the only passengers, i.e., that this does not constitute the "transportation of passengers" for "commercial purposes."

Lowe, supra at 1149 (Motz, dissenting); App-22.

B. THE FOURTH CIRCUIT RULING NULLIFIES CONGRESS' RESTRICTION OF SECTION 33 TO VEHICLES "USED, OPERATED OR EMPLOYED IN INTERSTATE COMMERCE"

This Court has ruled that Congress may regulate under its commerce power in three broad categories. First, it may regulate the use of the channels of interstate commerce. Second, Congress may regulate and protect the instrumentalities of interstate commerce, or persons or

things "in" interstate commerce, even though the threat may come only from intrastate activities. Third, Congress may regulate those activities having a substantial relation to interstate commerce--those activities that "substantially affect interstate commerce." *United States v. Lopez*, ___ U.S. ___, 115 S.Ct. 1624, 1629-1630, 131 L.Ed.2d 626 (1995); *Perez v. United States*, 402 U.S. 146, 150, 91 S. Ct. 1357, 1359-60, 28 L. Ed. 2d 686 (1971) (citations omitted).

As the Court repeatedly has emphasized, Congress is aware of the "distinction between legislation limited to activities *'in commerce'* and an assertion of its full Commerce Clause power so as to cover all activity substantially *affecting interstate commerce*." *United States v. American Building Maintenance Industries*, 422 U.S. 271, 280, 95 S.Ct. 2150, 45 L.Ed.2d 177 (1975) (emphasis added).

A statutory requirement that an activity 'affect commerce' indicates a desire by Congress to exercise all power conferred by the Commerce Clause. *See Russell v. United States*, 471 U.S. 858, 859, 105 S. Ct. 2455, 85 L. Ed. 2d 829 (1985) (using an explosive device to maliciously damage and destroy property used in an activity affecting interstate commerce); *Scarborough v. United States*, 431 U.S. 563, 571-72, 97 S. Ct. 1963, 52 L. Ed. 2d 582 (1977) (possession by a felon of a firearm "in commerce or affecting commerce"); *National Labor Relations Board v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226, 83 S. Ct. 312, 9 L. Ed. 2d 279 (1963) (National Labor Relations Act, prohibiting any unfair labor practice "affecting commerce"). However, Congress historically has employed the term "in commerce" much more narrowly than the phrase "affecting interstate commerce", with the knowledge that this Court has "drawn a sharp distinction between activities and the flow of interstate commerce and intrastate activities that affect interstate commerce." *American Building Maintenance Industries, supra*, 422 U.S. at 280.

Both the statutory language and legislative history demonstrate that, in enacting § 33, Congress deliberately chose not to exercise its full constitutional power to regulate activities "affecting interstate commerce." Congress carefully limited application of § 33 to attacks on vehicles "used, operated, or employed *in* interstate or foreign commerce," rejecting the broad scope of laws such as the federal arson statute, which applies to any vehicles "used in interstate or foreign commerce *or in any activity affecting interstate or foreign commerce*," 18 U.S.C. § 844(i).

The phrase "in commerce" is a much more restrictive jurisdictional requirement than the phrase "affecting interstate commerce," and denotes "only persons or activities within the flow of interstate commerce--the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer." *American Building Maintenance Industries, supra,* 422 U.S. at 276 (citations omitted).

Certainly, "Congress knew the significance and meaning of the language it employed." *Barrett v. United States,* 423 U.S. 212 , 216; 96 S.Ct. 498; 46 L.Ed.2d 450 (1976).[4] However, the Fourth Circuit's opinion obliterates the distinctions drawn by Congress, holding that the statutory requirement is met so long as the vehicles are "used in connection with or in furtherance of the interstate market activities of the entities operating or employing the vehicles"
Lowe, supra at 1148; App-19.

> The vehicles at issue here were clearly used in interstate commerce. Arch was engaged in the distribution of coal in the interstate market and Arch employed two companies, Elite and Deskins, each of which regularly sold security or environmental services in the interstate market. The vehicles in the convoy were used to further

---

[4]The origin of the statutory phrase "used, operated, or employed in interstate or foreign commerce" also is illustrative. This phrase appears in only two other sections of the code, both of which are clearly limited to vehicles which are instrumentalities of interstate commerce. 18 U.S.C. § 32, enacted along with § 33 in 1956, provides for federal prosecution of anyone who "sets fire to, damages, destroys, disables, or wrecks . . . any civil aircraft used, operated, or employed in interstate, overseas, or foreign air commerce." Sections 33 and 32 adopted the language of 18 U.S.C. § 1992, which authorizes prosecution of anyone who "willfully derails, disables, or wrecks any train, engine, motor unit, or car used, operated, or employed in interstate or foreign commerce by any railroad." H.R. Rep. No. 84-1979, 84th Cong., 2d Sess. (1956), *reprinted in* 1956 U.S.C.C.A.N. 3145. *See Perez v. United States, supra,* 402 U.S. at 151 (identifying § 32 as an example of Congress' limited exercise of jurisdiction for "protection of the instrumentalities of interstate commerce").

Further, the concept of interstate "transportation of passengers, passengers and property, or property or cargo" employed in the statute's definition of motor vehicle is considerably narrower in scope than "interstate commerce." In fact, the original definition of "interstate commerce" contained in 18 U.S.C. § 10 described it as "transportation between one State . . .and another State." In 1948, this definition was amended to substitute the word "commerce" for "transportation." Ch 645, § 1, 62 Stat. 686. The revisor's note reveals that the amendment was intended "to avoid the narrower connotation of the word 'transportation' since 'commerce' obviously includes more than "transportation" (citing H.R. Rep. 304, 80th Congress, 1948). Nevertheless, in adopting § 33 eight years later, Congress deliberately used the narrower concept of interstate *transportation.*

> the distribution of Arch's coal to interstate markets; indeed, without the assistance of Elite and Deskins, it is likely the Arch mine would have had to cease its operations permanently. Furthermore, the vehicles were used in furtherance of Elite's business of furnishing security services in the interstate market. In short, we have no difficulty concluding the vehicles in the convoy were used in interstate commerce at the time of the attack.

Id. at 1143; App-9.

The jury instructions in this case suffer from the same defect. The jury was informed that "the interstate commerce requirement may be satisfied if the government has proved . . . that the trucks being driven by employees of Elite Security and Deskins Contracting were used or employed by Arch of West Virginia in connection with and in furtherance of its business of distributing coal mined in West Virginia to consumers in another state, or used or employed by Elite Security in connection with and in the course of conducting its business of providing security services outside the State of North Carolina " (JA 1031-1032).

The Court of Appeals' analysis effectively transforms the narrow statutory requirement that the vehicles be "used in" interstate commerce, into the broad requirement that the use of the vehicles be "in connection with and in furtherance of the interstate market activities" of some entity. The decision, as well as the jury instructions in the case, improperly focuses on the interstate nature of the general business operations of Arch and Elite Security, without requiring that the vehicles themselves have some interstate nexus. As the dissent emphasized:

> No court has ever endorsed such a broad reading of § 33 and for good reason. The plain language of the statute clearly provides to the contrary. . . [O]nly if a person damages a "motor vehicle which is used, operated, or employed in interstate ... commerce" is his conduct forbidden by § 33. Thus, the vehicles themselves must have some connection to interstate commerce. That the owners of the vehicles, Arch and Elite, were engaged generally in interstate activities is wholly irrelevant.

Lowe, supra at 1149(Motz, dissenting); App-23.

This same error led two Courts of Appeals to reverse convictions under the federal arson statute, 18 U.S.C. §844(i), even though that

statute applies more broadly to any property or vehicles "used in any activity *affecting* interstate commerce."

In United States v. Monholland, 607 F.2d 1311 (10th Cir. 1979), the court held that proof of a conspiracy to destroy a vehicle used by a state judge to drive from home to court did not establish a violation of § 844(i), even assuming the judge's work was an activity affecting interstate commerce:

> [T]he function of the truck is to get the judge back and forth, and if the truck fails he would find some other means to accomplish the trip. We say, then, that the truck is wholly immaterial as far as any commerce is concerned even if we assume that there is a commerce quality about what the judge does after he gets to court. ... Since it is divorced from the activity carried on in court, there is no legal relationship whereby one can say that the truck affects commerce.

Similarly, in *United States v. Voss*, 787 F.2d 383 (8th Cir. 1986), the court reversed a realtor's conviction for burning a commercial property she owned, because the jury instructions permitted the interstate commerce nexus to be satisfied by proof that the realtor had purchased insurance in interstate commerce. The Eighth Circuit held that "the instruction was improper because it requires a nexus only between interstate commerce and the owner of the building, not the building itself... as is required by the statute," 787 F.2d at 396.

As the district court in this case repeatedly observed, the trucks driven by Elite and Deskins employees were not engaged in any type of interstate commerce:

> [W]e don't have that easy situation where there is a cargo being shipped, and the question is how do you conclude here that this event is somehow involving these motor vehicles as being used, operated, or employed in interstate commerce. What is it that they are doing that is in interstate commerce at this time? ...How are they to be deemed to be used, operated, or employed in interstate commerce? We don't have any product that we see that they are shipping out-of-state. We don't see a link with some other aspect of commerce that is interstate, other than the fact that we know that Arch is engaged in interstate commerce, Elite is engaged in

> interstate commerce, and even Deskins appears to be engaged in interstate commerce.
>
> At the particular time, however, the vehicles are on what seems to be a purely intrastate trip. . . But what is it that takes that out of that category of intrastate and puts it into an interstate character, except for the fact that Arch is engaged in the interstate business of shipping coal that is produced, and Elite is engaged in the interstate business of providing security services, and then again possibly Deskins is, too? Other than the mere fact that they are engaged in interstate commerce, what is the interstate commerce link? Is there any?"
>
> * * *
>
> [I]t seems to me as though there isn't any evidence in the case that the motor vehicles insofar as they were being operated by Deskins, if one looks to that factor alone, were being used, operated, or employed in interstate commerce on that day. All we have about Deskins is that its business was conducted in both West Virginia and Kentucky. Nothing else is said about involvement of these motor vehicles in any interstate aspect of the Deskins business... *I don't recall any evidence that ever indicated that those motor vehicles of Deskins were themselves used or operated or employed in interstate commerce.* (J.A. 912, 914, 951) (emphasis added).

Indeed, as the district court noted, the record in this case contains no evidence that any of the vehicles were being used in interstate commerce at the time of the incident. The two guard vehicles were being used by Elite Security on a purely local trip to the mine site "to look over the area to set up security for that evening" and to escort the Deskins vehicles off of the property. The Deskins vehicles were being used by Hensley and York solely to return from the mine site to their nearby shop. These uses of the vehicles may have "furthered" the interstate activities of Arch[5] and Elite, as the Fourth Circuit held, and it is clear that Congress

---

[5]The Fourth Circuit's opinion states that the work done by the Deskins contractors was necessary to the continuation of business by Arch of West Virginia, because Arch had "receiv[ed] a citation for a violation of the environmental laws, which could have led to the closing of the Ruffner Mine ... [and] without the assistance of Elite and Deskins, it is likely that Arch mine would have had to cease its operations permanently." *Lowe, supra* at 1139, 1143; App-1, 9. In fact, the evidence showed only that Arch had received "either a

has the power to apply the statute to uses of vehicles which "*substantially* affect interstate commerce," *Lopez, supra,* at 1630. However, it is equally clear that Congress deliberately chose not to adopt such an expansive application of § 33. By limiting the scope of § 33 to "vehicles *in* interstate commerce," Congress deliberately confined the statute to vehicles actually "within the flow of interstate commerce--the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer." *American Building Maintenance Industries, supra,* 422 U.S. at 276.

As Judge Motz's dissent warns, the Fourth Circuit's opinion employs a carefully and narrowly drawn statute to extend federal criminal jurisdiction over "every vehicle owned by a person or entity engaged in interstate commerce, no matter how confined the use of the vehicle, because conceivably every such vehicle somehow 'furthers' the interstate market activities of its owner."
Lowe, supra at 1150 (Motz, dissenting); App-25.

C. THE FOURTH CIRCUIT OPINION TRANSFORMS SECTION 33 INTO A POWERFUL TOOL FOR FEDERAL POLICING OF LOCAL LABOR DISPUTES, CONTRARY TO THE EXPRESSED INTENT OF CONGRESS

The Senate report accompanying the 1984 amendment indicates a congressional intent to apply § 33 when labor disputes result in violent attacks on channels or instruments of interstate commerce, such as trucks hauling interstate cargo. Indeed, the three of the four reported decisions by Courts of Appeals affirming convictions under § 33 arose from attacks on vehicles during labor strikes. *United States v. Lambert,* 994 F.2d 1088 (4th Cir. 1993) (attempt to disable Greyhound bus during strike); *United States v. Daniels,* 948 F.2d 1033 (6th Cir. 1991) (same); *United States v. Heightland,* 865 F.2d 94 (6th Cir. 1989) (attack by striking coal miners on truck transporting coal in first phase of interstate shipment). (The fourth such decision resulted from a drunken defendant's unfortunate

---

warning or ... a citation to clean the sediment pond" and that the mine was subject to closure if it received three citations for the same condition in one year (A. 513-14). At the time of the shooting, the mine already was closed due to the strike. Even if a closure order might have been issued before the strike ended, which was not proven, there was no absolutely no evidence that such a closure would be permanent.

encounter with a Greyhound bus and a friend who urged: "Shoot it! Shoot it!" *United States v. Kurka*, 818 F.2d 1427, 1431 (9th Cir.1987)).

However, in all four of these cases, the vehicles indisputably were in use, at the time of the attacks, in the "transportation of passengers, passengers and property, or property or cargo" on an interstate journey. The language and history of § 33 provide no support for expanding the statute's reach to include other categories of labor violence.

In *United States v. Enmons*, 410 U.S. 396, 93 S.Ct. 1007, 35 L.Ed.2d 379 (1973), this Court rejected a broad interpretation of the Hobbs Act urged by the government, which would have applied the federal extortion statute to violence incidental to a union strike for higher wages. The Court's analysis in that case is equally applicable here:

> Even if the language and history of the Act were less clear than we have found them to be, the Act could not properly be expanded as the Government suggests -- for two related reasons. First, this being a criminal statute, it must be strictly construed, and any ambiguity must be resolved in favor of lenity. Secondly, it would require statutory language much more explicit than that before us here to lead to the conclusion that Congress intended to put the Federal Government in the business of policing the orderly conduct of strikes. Neither the language of the Hobbs Act nor its legislative history can justify the conclusion that Congress intended to work such an extraordinary change in federal labor law or such an unprecedented incursion into the criminal jurisdiction of the States. *Id.*, 410 U.S. at 399-400 (citations and footnotes omitted).

In *United States v. Bass*, 404 U.S. 336, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971), the Court again stressed the necessity for a clear statement of congressional intent before a criminal statute will be held to have expanded federal jurisdiction into an area traditionally reserved to the states:

> [U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States. [W]e will not be quick to assume that Congress has meant to effect a significant change in

> the sensitive relation between federal and state criminal jurisdiction. In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision. . . In the instant case, the broad construction urged by the Government renders traditionally local criminal conduct a matter for federal enforcement and would also involve a substantial extension of federal police resources. Absent proof of some interstate commerce nexus in each case, § 1202(a) dramatically intrudes upon traditional state criminal jurisdiction. *As in Rewis, the legislative history provides scanty basis for concluding that Congress faced these serious questions and meant to affect the federal-state balance in the way now claimed by the Government.* *Id.* at 339 (citations omitted) (emphasis added).[6]

In *Enmons*, the Court also emphasized another factor equally applicable to this case:

> [N]ot until the indictments were returned in 1970 in this and several other cases has the Government even sought

---

[6]It appears that the Fourth Circuit may have been influenced by a different concept of federal-state balance. In affirming a conviction in a later, unrelated case which also originated in Logan County, West Virginia, the Court expressed the following view of the efficacy of state law enforcement efforts in the county:

> From the factual circumstances in this case, and those in our recently decided opinion in *United States v. Lowe*, 65 F.3d 1137 (4th Cir. 1995) [the present case], in the absence of prosecution by local and state authorities, one has to ponder whether the felonious killing of another is a criminal offense in Logan County, West Virginia.

United States v. Gullett, ___ F.3d ___, 1996 U.S. App. LEXIS 2027, slip opinion at 30, n.11 (4th Cir. 1996). Both members of the majority in this case also sat on the *Gullett* case, and the two opinions were authored by the same judge. However, there is no support in the record for the Court's apparent assumption that state officials were unwilling or unable to prosecute Petitioner or the other miners. The investigation into the death of Eddie York was a joint effort by the State of West Virginia and the FBI. Corporal G. R. Johnson of the West Virginia Division of Public Safety, examined the site of the shooting on July 22, 1993 (JA 520). He and another state policeman interview Petitioner later that night at the state police office at Logan, West Virginia (JA 540, 576-78). Special Agent Brad Hoffert of the FBI also was present (JA 543), and went to the scene of the shooting the following morning (JA 569). None of the witnesses suggested that the state itself would not have pursued the prosecution, if the federal authorities had not taken control of the investigation.

> to prosecute under the Hobbs Act actual or threatened violence employed to secure a union contract "calling for higher wages and other monetary benefit." Yet, throughout this period, the Nation has witnessed countless economic strikes, often unfortunately punctuated by violence. It is unlikely that if Congress had indeed wrought such a major expansion of federal criminal jurisdiction in enacting the Hobbs Act, its action would have so long passed unobserved. *Id.* at 410 (citation and footnotes omitted).

Since the *Enmons* decision, the nation has continued to witness "countless economic strikes, often unfortunately punctuated by violence," often against employers engaged in interstate commerce. However, there is no reason to believe that Congress intended narrowly tailored statutes such as § 33 to provide a broad basis for federal intervention in such disputes. In fact, Congress repeatedly has resisted efforts to overturn the *Enmons* decision by amending the Hobbs Act to permit its application to violence in labor disputes, for fear that it would represent an unwarranted federal intrusion into sensitive areas of labor relations traditionally left to the states.

Congressional sentiment on this issue was expressed in a lengthy Senate debate in 1986 when supporters of the proposed Hobbs Act amendment unsuccessfully attempted to engineer a floor vote. 32 Cong. Rec. S4337-01 (daily ed. April 16, 1986).[7] Proponents of the amendment decried the frequency of strike-related violence, including a recent coal strike in West Virginia which reportedly resulted in "745 windshields broken, 1677 truck tires destroyed, 178 coal trucks and other company vehicles burned or destroyed ... and 1 person, a truck driver, murdered by ambush by 27 high powered rifle shots shot through the cab of his truck." *Id.* (remarks of Senator Grassley).

Senator Dole sought to assure his fellow senators that "this bill will not enable Federal law enforcement to weigh in against unions during labor negotiations every time a rock or bottle is thrown by a union

---

[7] In *United States v. Enmons, supra,* a federal extortion prosecution for violent conduct during the course of a labor dispute, the Court held that the Hobbs Act did not reach all violence, but only violence that is wrongful in the sense that the extortionist did not have a lawful claim to the property he sought to obtain. Under this interpretation, the Hobbs Act does not reach the actual or threatened use of violence directed at obtaining a legitimate labor objective or economic benefits that can otherwise be lawfully obtained by collective bargaining.

member." Nevertheless, opponents of the amendment repeatedly asserted that federal prosecution of picket line violence, except in the rarest of circumstances, would "unnecessarily expand Federal jurisdiction into an area which has traditionally been effectively covered by State and local law" (remarks of Senator Durenberger).[8]

Congress' intent to restrict application of § 33 to vehicles directly engaged in the transportation of passengers and cargo on interstate journeys is clear. Equally unmistakable is Congress' historical reluctance to involve the federal government in prosecuting strike-related violence, except in cases involving particularly strong federal interests, such as the "definite federal interest" served by the limited scope of § 33 "in keeping open the channels of interstate commerce." There is no basis whatsoever to believe that Congress intended § 33 to represent the "major expansion of federal criminal jurisdiction," *Enmons, supra,* required to justify the prosecution in this case.

The Fourth Circuit's opinion, however, effects just such a "major expansion of federal criminal jurisdiction," and would permit federal prosecution of most local labor disputes. In rejecting the proposed Hobbs Act amendment, Congress expressed its unwillingness to "enable Federal law enforcement to weigh in against unions during labor negotiations every time a rock or bottle is thrown by a union member." See Remarks of *Senator Dole, supra.* However, the Fourth Circuit's ruling would

---

[8] *See remarks of Senator Simon* (no "necessity for the Federal Government to move in to police such labor violence"); remarks of Senator Specter (state prosecutors have "adequate remedies . . . to handle cases involving union violence"); *remarks of Senator Gorton* ("battery, assault, and willful destruction of property during a labor dispute ... are already crimes punishable under state law.... I do not believe a convincing case has been made to justify such a major change in Federal-State jurisdiction"); *remarks of Senator Leahy* (opposing "expansion of Federal criminal jurisdiction in an area where it is not needed... State and local prosecutors are not only able, but better equipped than Federal prosecutors to handle picket line violence"); *remarks of Senator Kennedy* ("bill is unnecessary because there is no single 'waive of labor violence' that might justify this vast expansion of Federal criminal jurisdiction"); *remarks of Senator Durenberger* ("I do not believe that the Federal Government should be in the business of policing picket lines; ... [T]he intervention of the Federal Government into union protests can greatly interfere with the collective bargaining process"); *remarks of Senator Metzenbaum* (amendment unnecessary since targeted activities are already illegal under state law; amendment "is simply a way to extend Federal jurisdiction into local affairs. It is a way to allow the FBI and U.S. attorneys to get involved in labor management-relations at the local level"). Senator Kennedy added "from a union busting perspective, this amendment makes a lot of sense. Bring in Federal law enforcement, with the threat of 20 years in jail and $10,000 in fines, and union busting mercenaries will have a field day." He also expressed concern that, although violence was often provoked by security guards hired by coal companies, the proposed amendment would penalize only union violence.

permit just that, so long as the rock or bottle is thrown " in, upon, or in proximity to, any motor vehicle ... or in, upon, or in proximity to any garage, terminal, structure, supply, or facility used in the operation of, or in support of the operation of, [a] vehicle," 18 U.S.C. §33, if the vehicle's use somehow "furthers" the interests of a company engaged in interstate commerce. The Court of Appeals' ruling in this case establishes a disturbing and unjustified precedent, which this Court should not allow to stand.

II. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN PETITIONER'S CONVICTION

The Government's identification of Lowe as the individual who fired the fatal shot was based upon a series of inferences from circumstantial evidence:

(a) O'Neil, the government's ballistics expert, established a geographic "cone" from which he testified the shot must have originated, based upon assumptions regarding the exact location of York's truck (and his body within it) at the instant he was shot, as well as the precise entry point of the bullet that shattered his truck's windshield;

(b) testimony by Lowe and three of his co-defendants regarding their respective positions at the time of the shooting, and the general locations of the other nine identified picketers present, suggested (with varying degrees of certainty) that Lowe was the only one of the thirteen identified individuals who was within the "cone" at the time of the shots; and

(c) Lowe admitted having possessed, for a short time some days prior to the shooting, the Colt Trooper Mark III which was stipulated to be the weapon which fired the fatal shot.

Petitioner's motions for judgment of acquittal, based upon the insufficiency of the evidence to support the multiple assumptions and inferences required by the Government's theory, were denied by the district court (JA 938), and the Court of Appeals affirmed this ruling. In so ruling, the Fourth Circuit primarily relied on three factors: (1) Lowe's admitted possession -- a week or two prior to the shooting -- of the weapon which killed York; (2) O'Neil's testimony establishing a

cone-shaped area from which the fatal shot originated; (3) "the circumstantial evidence . . . that the shot came from the creek side of the road in the area Lowe positioned himself for the ambush and the discovery of the Budweiser Light beer can within the conical area described by O'Neil, placed Lowe in the area described by O'Neil." *United States v. Lowe, supra* at 1141-42; App-6. However, the factors cited by the court are insufficient to enable a rationale jury to find Petitioner guilty beyond a reasonable doubt.

A critical element of the government's case was established through the testimony of Special Agent John O'Neil, who testified that his reconstruction of the shooting established a cone-shaped geographic area from which the fatal shot must have originated. According to the government's theory, Petitioner alone was present on the "creek side" of Slab Fork Hollow Road, within the zone identified by O'Neil, while the other miners threw rocks either from the other side of the road or from a separate access road to the mine, *id.*, 65 F.3d at 1139-41; App-2, 4.

O'Neil reached his conclusion by fastening a piece of string to three fixed reference points representing the path of the bullet, based upon: (a) the medical examiner's testimony regarding the path of the bullet through York's head, (b) opinions of the investigating officers regarding the location of the truck at the instant of the shot, and (c) O'Neil's own conclusion as to the precise point at which the bullet entered the rear windshield of York's truck. He then extended the string backward, using it to identify a cone-shaped area from which, he testified, the shot must have originated (JA 680-81).

O'Neil's theory was based on assumptions and inferences unsupported by competent evidence. For example, one of the three critical points used by O'Neil in determining the trajectory of the bullet was the medical examiner's "placing of the position of the head of the victim inside the truck cab" (JA 645, 722). However, the medical examiner's testimony was based upon the assumption that he was seated upright, looking straight ahead (JA 719-22). No witness actually saw York when the bullet hit, and the medical examiner's assumption regarding his position was pure speculation. Indeed, the driver of the other Deskins vehicle, Marion Hensley, testified that when the strikers began throwing rocks, he leaned in towards the middle of his truck cab to avoid the rocks

(JA 479-81). A similar reaction by Mr. York would invalidate Agent O'Neil's theory.[9]

Another assumption critical to O'Neil's theory was the point, within a two inch range, at which the bullet entered the rear windshield of York's vehicle (JA 681). However, the bullet shattered the windshield, producing a hole in the tempered glass large enough, as the district court observed, to make it possible that the bullet had "come from the sky" without further fixed reference points (JA 674). The entire windshield had been removed before O'Neil or the defense expert were able to examine it, and O'Neil's conclusion was based solely upon his viewing of a photograph of the windshield taken shortly after the shooting (JA 719). The photograph, he testified, shows a "white residue" on part of the remaining glass, which he concluded was caused by the bullet striking that exact area of the windshield. (JA 637-38). However, the "residue" was never subjected to any scientific testing, and O'Neil's entire knowledge of its nature was based upon viewing the photograph. (JA 638, 640-44). Certainly, a whitish area vaguely apparent a photograph could have been caused by any number of unrelated sources. O'Neil's conclusion on this critical issue fails to satisfy the minimum standards for admissibility of scientific or expert evidence. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, ---- U.S. ----, 113 S. Ct. 2786, 125 L. Ed.2d 469 (1993); Federal Rules of Evidence, Rule 702.

The defense expert testified that it is "absolutely impossible in this case to" determine the angle through which the bullet passed through the glass:

> [W]e do not have either a object that is relatively thick that is in a known fixed position, nor do we have two objects that are in a fixed position that allows us to establish an angle. All we have available to us in this case is a broken out window in the rear of the pickup truck . . . [W]e don't know . . . the position of the victim's head at the time of the shooting. We don't have the second object with the fixed position. . . [W]e don't have a precise location where the truck was at the time the shot was fired or the angle of the truck in the roadway at

---

[9]O'Neil's conclusion also is undermined by the testimony of Jerry McNeeley, one of the security guards in the convoy, who stated that the shots came from ". . over on this side of the road, *the same approximate location as where the rocks had come from*" (JA 456, 467) -- *i.e.*, a site where other striking miners, but not Lowe, were positioned.

> the time that the shot was fired. So lacking the information of knowing the position of the victim's head, the large hole that is in the window, not knowing the position of the truck in the road or the angle of the truck, it is impossible to make an accurate determination from where the bullet was fired (JA 865-67).

The Court of Appeals' held that a jury properly could conclude that, at the time of the shooting, Petitioner was located within the cone shaped area identified by O'Neil as the origin of the shot, relying heavily upon the presence of a Budweiser beer can (hardly an unusual discovery in southern West Virginia in mid-summer) at the site. The Court also noted that "[o]nly Lowe was known to have been within the area reflected by this cone." *Lowe, supra,* at 1141-42; App-6. However, the trial testimony was woefully inadequate to support a conclusion that Petitioner was the only person present within the area identified by O'Neil. Not a single witness purported to provide a complete listing of all of the individuals present at the time of the shooting, or of the individuals who could have been located within the cone shaped area. In fact, most of the witnesses affirmatively stated that there were other persons present whose names they either did not know or could not recall. (JA 281, 302, 308, 316, 326-28, 366-67, 370, 380-81, 394-95, 404, 408-09, 538). One of the witnesses testified that "*four or five other miners*" were in the same approximate location as Petitioner (JA 414-15).

In summary, the evidence -- even when viewed in the light most favorable to the verdict -- establishes simply that Petitioner had possession of the firearm which fired the fatal shot a week or two prior to the shooting, and that he was the only person the Government was able to place near the area from which, according to Agent O'Neil speculative theory, the shot originated. This evidence was not sufficient to convince a rational jury of Lowe's guilt beyond a reasonable doubt.

III. THE COURT OF APPEALS IMPROPERLY AFFIRMED THE DISTRICT COURT'S REFUSAL TO ADMIT EVIDENCE THAT LOWE NO LONGER HAD POSSESSION OF THE WEAPON AT THE TIME OF THE SHOOTING

Petitioner unsuccessfully attempted to introduce testimony from several sources which would have corroborated his own testimony that he no longer had possession of the Colt revolver on the date of York's death,

a claim which repeatedly was challenged by the government's theory that he possessed and used the gun on that day.

Petitioner's nephew, William Lowe testified that he purchased the Colt Trooper Mark II (later identified as the weapon with which York was shot) for $100 from his ex-girlfriend's brother in Illinois and soon found out that her father had reported it as stolen (JA 582). When he came to visit his family in West Virginia in early July of 1993, William Lowe brought the gun with him (JA 583). He showed his uncle the gun "a couple of days" following his arrival and told him that he wished to sell it for $100.00 (JA 584, 812).

Petitioner testified that he asked some of his fellow miners, including Erskine Holstein, if they were interested in purchasing the gun (JA 816-18). Holstein confirmed this, testifying that Jerry Lowe had brought the gun to the picket site looking for a purchaser (JA 94-95). Petitioner also testified that Jack Starkey, who was named as an unindicted co-conspirator in this case, purchased the gun (JA 784-85). However, the district court refused to permit either Petitioner or William Lowe to testify that, prior to the shooting and thus before any motive for fabrication arose, William Lowe himself had found a purchaser for the gun, and had attempted to retrieve it from Petitioner, who replied that it already had been sold to another person and could not be recovered.

The Court of Appeals held that the statement was not admissible as a prior consistent statement under F.R.Evid. Rule 801(d)(1)(B), which provides that a statement is not hearsay if the declarant testifies and the statement is "consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." Following Fourth Circuit precedent, the Court held that:

> 'proof of prior consistent statements is not admissible *unless and until* there has been some impeachment of the witness.' Because Lowe attempted to introduce his prior statement *before his testimony was impeached* by the government, his statement to William Lowe was not admissible under Rule 801(d)(1)(B) during the cross-examination of William Lowe, and later during his own direct examination." *Lowe, supra* at 1144; App-12 (citations omitted) (emphasis added).

The Fourth Circuit ruling that a prior, express impeachment of the declarant is a prerequisite for admission of a prior consistent statement

under Rule 801(d)(1)(B), is in conflict with the rules of other circuits permitting such evidence to be introduced in anticipation of impeachment, where the government's theory of the case necessarily suggests that the defense is a recent fabrication.

Neither the language of the rule nor the case law from other circuits requires that the witness first be specifically impeached prior to the introduction of the consistent statement. It is enough if, as in this case, the government suggests through argument, or presentation of its case in chief, or through cross-examination of witnesses, that the defendant's version is a fabrication. See *United States v. Casoni*, 950 F.2d 893, 904 (3d Cir.1991) ('The government correctly responds that prior consistent statements are not limited to statements concerning specific inconsistencies brought out on cross-examination. Rather, there need be only a suggestion' that witness consciously altered testimony to allow prior consistent statement into evidence"); *United States v. Gonzalez*, 700 F.2d 196, 202 (5th Cir. 1983) ("Gonzalez offered his wife's testimony *in response to the government's evidence and in anticipation of the government's inevitable attack on his own testimony.* Because the implication of the government's evidence necessarily was that Gonzalez had fabricated his defense of lack of criminal intent, Gonzalez should have been permitted to introduce evidence of his prior consistent statement to his wife") (emphasis added). *See also*, 47 A.L.R.Fed. 639-651 ("While admissibility thus depends initially on an attack upon a witness' credibility in an attempt to show such recent fabrication, the courts have taken a generous view of the entire trial setting in determining whether there was sufficient impeachment of a witness to permit evidence of prior consistent statement to be admitted").

In this case, the government's entire theory of the case implied that Lowe's claim to have delivered possession of the gun to Starkey prior to the shooting was a fabrication. Petitioner's alleged possession of the gun at the time of the shooting was critical to the government's case.

In its opening statement, the government claimed that William Lowe "gave that gun to his uncle and his uncle ... [had] the opportunity, he had the Colt Trooper" (JA 258). The government presented William Lowe as a witness and questioned him extensively to establish that he had given the gun to Petitioner (JA 582-85). On cross-examination, defense counsel attempted to elicit testimony regarding his unsuccessful attempt

to retreive the gun and Petitioner's statement that it already had been sold (JA 587-90).[10]

On two other occasions, during the direct testimony of Petitioner himself and during a later appearance by William Lowe as a defense witness, Petitioner again attempted to introduce his prior consistent statement to his nephew (JA 785-94, 585-89). Each time, the district court prohibited the testimony from being admitted.

The Court of Appeals also upheld the district court's refusal to admit evidence that Jack Starkey, one of the other miners present at the time of the shooting, had admitted to federal agents, through his attorney, that he had purchased the gun from Lowe at least a week before the shooting *Lowe, supra* at 1146; App-16; JA 1165).

In the grand jury investigating York's death, Starkey had refused to testify, asserting his fifth amendment privilege against self-incrimination (JA 1153). Sometime later, Lowe approached him and asked him to turn the gun over to the federal prosecutors (JA 795). Starkey gave the weapon to his attorney, Jack Kessler, who sent it to the prosecutors, using another attorney as an intermediary to keep his client from being identified as the weapon's origin (JA 1159).

Prior to trial, Lowe's counsel learned that Starkey would assert his fifth amendment privilege if called to testify (JA 126; 1182-83). The defense accordingly subpoenaed Kessler, intending to ask him about admissions Starkey had made, in the presence of third parties, confirming his possession of the weapon (JA 73).

Government attorneys, alerted by the issuance of the subpoena to the probability that one of Kessler's clients was the origin of the Colt, investigated further and identified Starkey as the most likely suspect (JA 1161-62). On June 6, 1994, Assistant United States Attorney John Parr telephoned Kessler, and began a series of discussions which resulted in an ultimatum: unless Starkey made a proffer to the government disclosing his knowledge regarding the weapon, he would be indicted under § 33 for his participation in the rock throwing incident, as well as a charge related to possession of a stolen weapon. Parr further told Kessler that, *if the jury determined that Lowe was not responsible for York's death, the government would seek Starkey's indictment on that charge*, using

---

[10]The Courts of Appeals have held, with one exception, that Rule 801(d)(1)(B) does not bar introduction of the prior consistent statement through a witness other than the declarant. *See United States v. Montague*, 958 F.2d 1094 (D.C. Cir. 1992) and cases cited therein.

Lowe's testimony to establish that Starkey had possession of the gun at the time of the shooting (JA 1162-64).

On the other hand, Parr said, if Starkey had purchased the gun *subsequent* to the shooting, or "if he didn't do anything but throw the rocks and we accepted the proffer, that probably wouldn't be a problem, we'd give him -- we'd do an immunity agreement" (JA 1164-65).

Despite the obvious detriment to his own self-interest, Starkey then made a proffer to the prosecutors in which he admitted that he had purchased the gun from Lowe *prior* to York's death, although he also claimed he had taken it to his farm in Pocohantas County, West Virginia, where it remained until it was turned over to the prosecutors (JA 1164-65).

The government and defense stipulated that Starkey's plan to assert the Fifth Amendment if called at trial rendered him "unavailable as a witness" under F. R. E. Rule 804(b) (JA 1174). The defense then attempted to admit the substance of Starkey's proffer into evidence, either through a stipulation that the proffer had been made, or through the testimony of Kessler, Johnson or Hoffert, as a statement against interest under F.R.Evid. Rule 804(b)(3).[11]

The Government repeatedly acknowledged that the statement was against Mr. Starkey's penal interests:

> There are still -- this is an individual who has no immunity regarding this incident at all. There are all kinds of charges for which could be brought against him.
>
> (Pretrial transcript, p. 13.

However, the district court ruled the statement inadmissible under Rule 804(b)(3), finding no "corroborating circumstances clearly indicate the trustworthiness of the statement," as required by the rule. The Court of Appeals upheld the district court's exclusion Starkey's proffer, in part

---

[11]Rule 804 (b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

***

(3) Statement Against Interest
A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

because "there was no evidence offered to corroborate the portion of Starkey's statement that, following the alleged purchase, the ... pistol was taken out to Starkey's farm and remained there until Starkey relinquished control over it several months later." *Lowe, supra* at 1146; App-16. However, this reasoning does not justify excluding the rest of Starkey's proffer, which was amply corroborated: testimony by Erskine Holstein (JA 94-95) and William Lowe, as well as the Petitioner himself, that Petitioner had offered the gun for sale a week prior to the shooting; William Lowe's proffer that Petitioner told him, prior to July 22, that the gun already had been sold and could not be retrieved by him; the lack of any witnesses placing Petitioner in possession of the gun for a week prior to the shooting; and testimony by the miners who appeared as government witnesses that, when they saw Lowe immediately before and after the shooting, they saw nothing on his person or under his clothing that could have been the ten-inch long Colt pistol (JA 339, 357, 385).

The Court of Appeals also justified the exclusion of Starkey's proffer on the grounds that Starkey had a motive to lie since he and Lowe were "union brethren" and because "the government, through its theory of the shooting, could not place Starkey in the area in which the fatal shot originated." *Id.* Petitioner is aware of no prior case in which mere membership in a union has been considered a sufficient motive to commit perjury. Moreover, the Court's statement that Starkey was excluded as a suspect by the government's evidence regarding the origin of the shot is not supported by the record. The following testimony by Earnest Woods constitutes the *entire* record evidence as to Starkey's location at the time of the shooting:

Q. Do you know an individual by the name of Jack Starkey? I think his name is Lawton Jack Starkey.

A. Yes, sir.

Q. Did you recall seeing him in that area at that time?

A. Yes, sir.

Q. Can you tell me and mark where you believe he was at that time?

A. (Complied) (JA 324).

Woods "complied" with the government's request, apparently, by placing a mark on the government's photographic exhibit of the shooting site. However, the record does not even suggest the location Woods identified. Woods' testimony also fails to establish the precise time at

which he saw Starkey, or whether Starkey could have changed his position prior to the shooting.

Moreover, the government apparently believed that it had sufficient evidence to prosecute Starkey in connection with York's death. The Assistant United States Attorney told Starkey's attorney that, if the jury determined that Lowe was not responsible for York's death, the government would seek Starkey's indictment on that charge, using Lowe's testimony to establish that Starkey had possession of the gun at the time of the shooting (JA 1162-64). Despite the obvious detriment to his own self-interest, Starkey then made a proffer to the prosecutors in which he admitted that he had purchased the gun from Lowe prior to York's death, and his attorney delivered the weapon to the prosecutors (JA 1159).

This corroborating evidence, together with the indicia of reliability resulting from the circumstances under which the proffer was made -- including Starkey's exposure to a direct threat of prosecution, and the active involvement of his attorney in the making of the proffer -- were more than sufficient to permit Lowe to inform the jury of Starkey's proffer.

In its final argument, the government exploited Lowe's inability to present evidence that he had sold the gun prior to York's shooting:

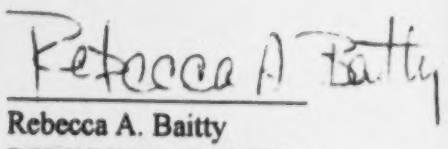
> And [Lowe] had possessed that gun. No one questioned -- *no one said that he didn't have that gun during the course of this trial,* ladies and gentlemen. *You never heard any testimony, other than the fact that that defendant had that gun.* Starkey, and the court will read you an instruction in reference to the invocation of a Fifth Amendment right and what tends to inculpate means. It means just that, it tends to inculpate, nothing else. *No testimony came out differently.* The point is that gun was there (JA 982).

Under the unusual circumstances of this case, the court's refusal to admit evidence of Petitioner's prior consistent statement to his nephew and Starkey's proffer, which would have tended to establish that the defendant "didn't have that gun" at the time of the shooting, constitutes not only an abuse of discretion but a denial of Lowe's right to due process.

CONCLUSION

For the reasons stated above, Petitioner Jerry Dale Lowe asks this Court to issue a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit and, upon review of that Court's decision, to reverse his conviction.

Respectfully submitted,



Rebecca A. Baitty
REBECCA A. BAITTY, P.A.
9 Fillmore Drive
Sarasota, Florida 34236
Telephone: (941) 388-3400
Attorney for Petitioner

NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JERRY DALE LOWE, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

Petition Writ of Certiorari to
the United States Court of Appeals
for the Fourth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Rebecca A. Baitty
Rebecca A.Baitty, P.A.
9 Fillmore Drive
Sarasota, FL 34236
(941) 388-3400
Counsel for Petitioner

APPENDIX
TABLE OF CONTENTS

1. Opinion of United States Court of Appeals for the Fourth Circuit, *United States v. Lowe*, 65 F.3d 1137 (4th Cir. 1995) App-1

2. Order of United States Court of Appeals for the Fourth Circuit, entered November 24, 1995, denying Appellant's Petition for Rehearing and Suggestion of Rehearing En Banc App-27

3. Mandate of United States Court of Appeals for the Fourth Circuit, *United States v. Lowe*, filed December 4, 1995 ..... App-29

4. Indictment, *United States v. Lowe* App-30

65 F.3d 1137

UNITED STATES of America, Plaintiff-Appellee,

v.

JERRY DALE LOWE, Defendant-Appellant.

No. 94-5713.

United States Court of Appeals,

Fourth Circuit.

Argued July 13, 1995.

Decided Sept. 20, 1995.

Before NIEMEYER, HAMILTON, and MOTZ, Circuit Judges.

HAMILTON, Circuit Judge:

Appellant, Jerry Dale Lowe (Lowe), appeals his conviction and sentence for three violations of 18 U.S.C. § 33 and one violation of 18 U.S.C. § 924(c)(1). For reasons that follow, we affirm.

I

The events giving rise to Lowe's criminal prosecution occurred on July 22, 1993, at a picket line during a national strike by the United Mine Workers of America (UMWA). As part of the strike, which began on May 18, 1993, Local 5958 of the UMWA began a work stoppage at a surface mine in Logan County, West Virginia. The mine, known as the Ruffner Mine, was operated and owned by Apogee Coal Company, d/b/a "Arch of West Virginia" (Arch). The coal mined from the Ruffner Mine was distributed to various states in the United States.

Arch regularly employed Blackhawk Security and Investigators to provide security services when the mine was not on strike. However, after being selected by the UMWA as one of the targets of the national strike, Arch contracted with Elite Security Company (Elite), a North Carolina corporation. Elite assumed the responsibility of providing security services for safeguarding personnel, supplies, and equipment of Arch and its subcontractors.

The picket line at issue was not at the entrance to the Ruffner Mine, but rather on a road, Slab Fork Hollow Road, which leads to the entrance of the Orion Mine, a mine not selected as a target by the UMWA. The picket line on Slab Fork Hollow Road was established, among other reasons, because the Orion Mine, which was not a target of the UMWA, continued to mine coal for Arch during the strike.

Slab Fork Hollow Road runs from Rum Creek Road into a hollow where it eventually leads to the entrance to Orion Mine and a sediment pond used by Arch. [1] The picket line was located on Slab Fork Hollow Road a short distance from the point where Slab Fork Hollow Road and Rum Creek Road intersect. The picket line was also close to an access road which ran perpendicular to Slab Fork Road; the access road was on the left when traveling away from Rum Creek Road toward the Orion Mine and the sediment pond. [2]

Prior to the strike, Arch contracted with Deskins Contracting (Deskins) to provide environmental services to the sediment pond on Slab Fork Hollow Road utilized by the Ruffner Mine.[3] After receiving a citation for a violation of the environmental laws, which could have led to the closing of the Ruffner Mine, Arch contracted with Deskins to clean the sediment pond.

On July 22, 1993, heavy equipment was taken to the sediment pond to perform the legally-mandated environmental corrections. Two Deskins employees, Marion Hensley (Hensley) and John Edward York (York), were assigned to travel to the sediment pond in separate company trucks owned by Deskins and to remove sludge from the sediment pond.

---

[1]The sediment pond on Slab Fork Hollow Road utilized by Arch and the Orion Mine were accessible only from Slab Fork Hollow Road.

[2]The side of Slab Fork Hollow Road on which the entrance to the access road is located was referred to at trial as the "creek side" of Slab Fork Hollow Road; a creek runs along that side of Slab Fork Hollow Road.

[3]Deskins, a West Virginia based business, provided mine contracting services, including environmental services, in both West Virginia and Kentucky.

Hensley arrived at the sediment pond on the morning of July 22, 1993, and was later joined by York between 12:30 p.m. and 1:00 p.m.

Various union pickets appeared at the picket line pursuant to their shift obligations. Although Lowe was not scheduled to work the picket line on July 22, 1993, he arrived at the picket line sometime between noon and 1:00 P.M. When Lowe learned that the Deskins' equipment had passed the picket line traveling to the sediment pond, he left the area, and returned to his home, which was located nearby. Once at his home, Lowe telephoned the president of Local 5958, Ernest Lee Woods (Woods). Lowe left a message for Woods regarding the heavy equipment's arrival at the sediment pond and insisted that he come to the picket line. Lowe then returned to the picket line. While Lowe was at the picket line that day, he drank Budweiser Light beer[4] and stopped the second-shift Orion miners from reporting to work.[5]

At approximately 5:00 p.m., a Ford Bronco driven by Larry Kopplin of Elite and a Chevrolet Club Cab driven by another employee of Elite, left the guard shack at the entrance of the Ruffner Mine to provide an escort through the picket line for Hensley and York.[6] As the two-car convoy travelled up Slab Fork Hollow Road and passed the picket line, the Ford Bronco was hit by a steel ball shot from a wrist rocket launched by one of the pickets. The ball hit the Ford Bronco below the glass on the passenger side. As the security vehicles were proceeding up Slab Fork Hollow Road toward the sediment pond, the pickets heard a loud noise, which some pickets believed to be a backfire. Others believed the noise was a firecracker, and still others thought it was a gun shot resulting from one of the security guards firing into the air.

---

[4]Lowe brought the Budweiser Light beer to the picket line in his truck. UMWA regulations prohibit the consumption of alcohol at picket lines.

[5]Woods later instructed the pickets to allow the second-shift Orion miners to report to work.

[6]The entrance to the Ruffner Mine is three to four miles from the intersection of Slab Fork Hollow Road and Rum Creek Road.

Woods was one of the pickets who believed that the security guards had fired a shot to intimidate the pickets. Angered by this action, Woods, along with other pickets gathered to discuss an appropriate response. At this meeting, the pickets decided to ambush the vehicles when they returned.

Collectively, the pickets began taking positions for the attack, masking themselves and gathering rocks as they waited for the trucks to return. Most of the pickets took positions on the access road. Two pickets, Luther Shell and Larry Perry, took positions on the side of Slab Fork Hollow Road opposite the creek. Lowe positioned himself in a wooded-area along the creek side of Slab Fork Hollow Road; this area was in a direction away from the access road toward the Orion Mine and the sediment pond utilized by Arch.

At approximately 5:30 p.m., the convoy of four vehicles, lead by Kopplin in the Ford Bronco, started down Slab Fork Hollow Road, followed by York's pick-up truck, the truck driven by Hensley, and finally the Chevrolet Club Cab driven by another employee of Elite. Before they reached the area where the pickets gathered, Hensley and York stopped their vehicles to have a discussion. According to Hensley, York stated that he was afraid to go ahead of Hensley and asked Hensley to go in front of him. Hensley and York then switched the positions of their trucks, with Hensley going in front of York.

As the vehicle driven by Kopplin approached the area where the pickets were waiting, his Ford Bronco was pelted by rocks, smashing the windshield. Hensley's vehicle suffered the same attack, with his windshield being broken. When York saw the rock attack, he initially slowed down and then sped up. As York was approaching the rock throwers, a bullet, fired from the creek side of Slab Fork Hollow Road from the area Lowe had positioned himself, entered the rear window of his pick-up truck, striking York in the head and killing him instantly. York's vehicle came to rest on the side of Slab Fork Hollow Road opposite the creek. The Chevrolet Club Cab's back passenger window was also struck by a bullet from the same area on the creek side of Slab Fork Hollow Road.

When Kopplin attempted to aid York, the pickets continued to throw rocks until Woods realized that York was seriously injured and told them to stop. At that time, the pickets complied. The pickets then began running in a direction away from the vehicle in which York lay dead.

Following the report of the shooting, the West Virginia State Police appeared at the scene with Corporal Bob Johnson (Johnson) taking the lead in the investigation. Statements were taken that night from a number of the miners who were present at the picket line. In his statement, Lowe admitted to participating in the rock attack, but specifically denied that he had been drinking.

The continuing investigation in the case revealed that the bullet that entered the back of York's head had a "left-hand twist," which immediately suggested to the officers that they were looking for a Colt-manufactured pistol. A Colt Trooper Mark III pistol was known to be a pistol that could produce a "left- hand twist" marking on a bullet. It was later learned that Lowe, on a day previous to the day York was killed, possessed a Colt Trooper Mark III pistol at the picket site, having transported it to the picket site in his truck. On two occasions during the investigation, Johnson and FBI Agent Brad Hoffert asked Lowe if he had ever owned, traded, or possessed a Colt Trooper pistol. On each occasion, Lowe denied owning, possessing, or trading such a pistol.

The investigators later learned that William Lowe, Lowe's nephew, had brought a stolen .357 Colt Trooper Mark III pistol to West Virginia from Marseilles, Illinois, on July 10, 1993, showed the weapon to Lowe on or about July 12, 1993, and gave it to him approximately two days later. Approximately three months after the ambush, the government recovered the Colt Trooper Mark III pistol possessed by Lowe and William Lowe when it was turned over to the government by the attorney for Lawton Jack Starkey (Starkey).[7] At trial, Lowe testified that he sold the weapon to Starkey "[a] week to two weeks" prior to the ambush. (J.A. 785).

---

[7]Starkey was one of the pickets who participated in the ambush.

On November 2, 1993, a grand jury sitting in the Southern District of West Virginia returned a four-count indictment against Lowe and seven others. Count one charged Lowe and seven others with conspiring to willfully, with reckless disregard for the safety of human life, attempt to damage and disable a motor vehicle which was being used in interstate commerce, and likewise to incapacitate the driver of the vehicle, see 18 U.S.C. §§ 33 and 371. Count two of the indictment alleged that Lowe, aided and abetted by others, with reckless disregard for the safety of human life, willfully damaged, disabled, and attempted to damage and disable motor vehicles which were being used in interstate commerce, see 18 U.S.C. §§ 33 and 2. Count three charged Lowe with an additional violation of 18 U.S.C. § 33 for shooting York, and count four charged Lowe with using a firearm during a crime of violence, see 18 U.S.C. § 924(c)(1).

On June 13, 1994, the case proceeded to trial. At trial, the government introduced evidence as to the positioning of each of the pickets participating in the ambush. The government also introduced evidence that, just prior to the ambush, Lowe possessed a BB-gun, but complained that the BB-gun was "worthless" and that he "would be better off to throw a rock." (J.A. 340). After making this statement, Lowe took the BB-gun back to his truck, the same truck in which he had been seen carrying the Colt Trooper Mark III pistol. The government also introduced the expert testimony of John O'Neil (O'Neil), a senior firearms and toolmark examiner for the Bureau of Alcohol, Tobacco, and Firearms. O'Neil, who testified as an expert in the determination of ballistics, firearms identification, and crime scene shot reconstruction, testified that the Colt Trooper Mark III pistol was the weapon that fired the shot which killed York. O'Neil further testified, in relation to shot reconstruction, that based on information normally relied upon by authorities in his field of expertise, he was able to determine a conical area from which the fatal shot would have had to originate. Only Lowe was known to have been within the area reflected by this cone. At the site, and within the possible firing area indicated by O'Neil, was a banked area approximately four to six feet off Slab Fork Hollow Road. In that area, a Budweiser Light beer can was recovered.

On June 24, 1994, the jury returned verdicts of guilty on all four counts of the indictment. The district court sentenced Lowe to 130 months' imprisonment. Lowe was also ordered to pay restitution in the amount of $6,318.50 as reimbursement to York's family for funeral expenses.[8]

Lowe appeals.

II

We will first address Lowe's challenges to the sufficiency of the evidence.

A

In reviewing the sufficiency of the evidence to support Lowe's convictions, this court must view the circumstantial and direct evidence in the light most favorable to the government and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); *United States v. Giunta*, 925 F.2d 758, 764 (4th Cir.1991). Credibility determinations are within the sole province of the jury and are not susceptible to judicial review. See *United States v. Saunders*, 886 F.2d 56, 60 (4th Cir.1989).

B

Lowe argues that the government did not offer sufficient proof at trial that his conduct fell within two definitional provisions of 18 U.S.C. § 33. To address these arguments, we must turn to the pertinent language of § 33:

> Whoever willfully, with intent to endanger the safety of any person on board or anyone who he believes will

---

[8]Lowe's seven codefendants entered into plea agreements with the government wherein they agreed to plead guilty to destruction of property in state court. Each codefendant was sentenced to 120 days' imprisonment and fined $500.

> board the same, or with a reckless disregard for the safety of human life, damages, disables, destroys, tampers with, or places or causes to be placed any explosive or other destructive substance in, upon, or in proximity to, any motor vehicle which is used, operated, or employed in interstate or foreign commerce, or its cargo or material used or intended to be used in connection with its operation; or ...
>
> Whoever with like intent, willfully disables or incapacitates any driver or person employed in connection with the operation or maintenance of the motor vehicle, or in any way lessens the ability of such person to perform his duties as such; or
>
> Whoever willfully attempts to do any of the aforementioned acts--shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

The accompanying definitional provision, 18 U.S.C. § 31, defines "motor vehicle" as a:

> carriage or other contrivance propelled or drawn by mechanical power and used for commercial purposes on the highways in the transportation of passengers, passengers and property, or property or cargo[.]

Section 31 also defines "used for commercial purposes" as the:

> carriage of persons or property for any fare, fee, rate, charge, or other consideration, or directly or indirectly in connection with any business, or other undertaking intended for profit.

Lowe contends that the vehicles involved in this case did not meet the definition of "motor vehicle" as defined in 18 U.S.C. § 31. We disagree. Clearly, all of the vehicles in the convoy were: (1) a "carriage or other contrivance propelled or drawn by mechanical power"; (2) used "directly ... in connection with a[ ] business"; and (3) used on the highways. Furthermore, each of the vehicles was used "in the transportation of passengers." The Elite vehicles were used to escort the Deskins employees from the waste area to a safe point outside the mine, and the vehicles used by Deskins were used to transport workers for Deskins from the waste area to a safe point outside the mine. Thus, the vehicles in the convoy were "motor vehicles" within the meaning of the statute.

2

Lowe's next contention is that the government did not offer sufficient proof at trial that the vehicles at issue were used in interstate commerce within the meaning of § 33. Again, we disagree. The vehicles at issue here were clearly used in interstate commerce. Arch was engaged in the distribution of coal in the interstate market and Arch employed two companies, Elite and Deskins, each of which regularly sold security or environmental services in the interstate market. The vehicles in the convoy were used to further the distribution of Arch's coal to interstate markets; indeed, without the assistance of Elite and Deskins, it is likely the Arch mine would have had to cease its operations permanently. Furthermore, the vehicles were used in furtherance of Elite's business of furnishing security services in the interstate market. In short, we have no difficulty concluding the vehicles in the convoy were used in interstate commerce at the time of the attack.

C

Lowe also contends that the government offered insufficient proof at trial that he fired the shot that killed York. We disagree. In this case, the jury had ample circumstantial evidence from which it could rationally conclude that Lowe fired the fatal shot from the Colt Trooper Mark III pistol which ended the life of York. First, as testified to by O'Neil, it was uncontroverted at trial that the Colt Trooper Mark III pistol fired the fatal

shot that killed York. Second, Lowe, within days prior to the shooting, possessed the Colt Trooper Mark III pistol at the picket site. Third, shortly before the attack, Lowe was seen in possession of a BB-gun, but complained it was worthless for an attack on the vehicles; Lowe then took the BB-gun back to his truck--the same truck in which he had been seen carrying the Colt Trooper Mark III pistol. Fourth, there is evidence in the record from which the jury could find that Lowe fired the fatal shot. In this regard, O'Neil's testimony established a cone-shaped area from which the fatal shot originated and the circumstantial evidence, namely, the evidence that the shot came from the creek side of the road in the area Lowe positioned himself for the ambush and the discovery of the Budweiser Light beer can within the conical area described by O'Neil, placed Lowe in the area described by O'Neil. In light of this evidence, a rational jury could determine, beyond a reasonable doubt, that Lowe possessed the Colt Trooper Mark III pistol and fired the fatal shot that killed York.

III

Lowe also attacks two evidentiary rulings made by the district court.

A

Lowe argues that the district court committed reversible error when it refused to admit his statement (made several days prior to the shooting) to William Lowe that he had sold the Colt Trooper Mark III pistol and could not get it back. At trial, Lowe sought to introduce this statement during the cross- examination of William Lowe, and later during his own direct examination. On the former occasion, Lowe claimed his statement was not hearsay because the statement was not offered for the truth of the matter asserted, see Fed.R.Evid. 801(c), and, even if it was, the statement was *res gestae*. On the latter occasion, Lowe contended that his statement to William Lowe was admissible as a statement against interest under Rule 804(b)(3). After both attempts to admit this statement, the district court sustained the government's objection.

On appeal, Lowe argues that his statement to William Lowe should have been admitted as a prior consistent statement to rebut an express or implied charge of recent fabrication under Rule 801(d)(1)(B). Having failed to argue at trial that his statement to William Lowe was admissible under Rule 801(d)(1)(B), we review for plain error under Fed.R.Crim.P. 52(b). *See Hudspeth v. Commissioner*, 914 F.2d 1207, 1215 (9th Cir.1990) (Under Rule 103(a) and (d), "[w]hen the trial court excludes evidence, failure to make a timely invocation of the grounds for the admission of the evidence renders the issue reviewable only for plain error."); *see also United States v. Pugliese*, 712 F.2d 1574, 1580-81 (2d Cir.1983) (On appeal, defendant precluded from asserting grounds for admissibility that were not raised at trial); *United States v. Sims*, 617 F.2d 1371, 1375-78 (9th Cir.1980) (court applied plain error standard to defendant's argument on appeal that FBI report was not hearsay or was admissible under the public records exception, Rule 803(8), where the defendant, after the government objected to the report's admission, contended that the report was admissible as a business record under Rule 803(6)).

Under Fed.R.Crim.P. 52(b), our review is limited to correcting errors which meet four requirements. *See United States v. Olano*, --- U.S. ----, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). Under *Olano*, we may correct: (1) error; (2) that is plain; (3) that affects substantial rights; and (4) that " 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.' " *Id.* at 1776-79.

We believe the district court did not commit error, let alone plain error, in refusing to admit Lowe's statement. Rule 801(d)(1) provides that a statement is not hearsay if:

> The declarant testifies at the trial or hearing and is subject to cross- examination concerning the statement, and the statement is ... (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.

Under this rule, "[c]orroborative testimony consisting of prior, consistent statements is ordinarily inadmissible unless the testimony sought to be bolstered has first been impeached." *See United States v. Weil*, 561 F.2d 1109, 1111 (4th Cir.1977); *see also United States v. Leggett*, 312 F.2d 566, 572 (4th Cir.1962) ("The decisions following the established rule are in agreement in holding that proof of prior consistent statements is not admissible unless and until there has been some impeachment of the witness."). Because Lowe attempted to introduce his prior statement before his testimony was impeached by the government, his statement to William Lowe was not admissible under Rule 801(d)(1)(B) during the cross-examination of William Lowe, and later during his own direct examination.

During the presentation of Lowe's defense, he called William Lowe to testify. Lowe argues that, during William Lowe's direct examination, the district court erred in refusing to admit Lowe's statement to William Lowe pursuant to Rule 801(d)(1)(B). The record, however, reflects that the district court did not exclude the statement at this time. The following exchange occurred during the direct examination of William Lowe:

> Q. After you gave him the gun, did there come a time that you went to you uncle to try to get the gun back?
>
> A. Yes.
>
> Q. Was that before or after July 22nd?
>
> A. Before.
>
> Q. Were you able to get the gun back from Mr. Lowe?
>
> MR. PARR: Objection, Your Honor. This is what we dealt with at the bench.
>
> THE COURT: The witness has already answered that question earlier in the trial, and if it's objectionable, it's simply because it's already

> been covered, but I suppose there is no harm in answering it again. Put the question again and let's see what the witness' answer is.
>
> Q. Were you able to get the gun back, Mr. Lowe?
>
> A. No, I wasn't.

(J.A. 812-13). Because Lowe never sought to introduce his statement to William Lowe during William Lowe's direct examination, the district court could not have committed reversible error in refusing to admit it at that time.

B

The second statement Lowe attempted to introduce concerned a proffer given by the attorney for Lawton Jack Starkey regarding Starkey's purchase of the Colt Trooper Mark III pistol. The proffer from Starkey's counsel indicated that Starkey had purchased the Colt Trooper Mark III pistol from Lowe prior to July 22, 1993, and that following his purchase, he took the pistol to his farm in Pocahontas County, West Virginia, where it remained until he made arrangements with his counsel to provide the weapon to the government nearly three months after the attack. The proffer specifically included the representation that when Starkey received the pistol from Lowe, he did not know it was stolen. The proffer likewise denied any involvement by Starkey in the shooting of York.

At trial, Lowe contended that counsel for Starkey should be required to testify and that the proffer should be admitted as a statement against interest under Rule 804(b)(3). The district court ruled that the statement was clearly hearsay and not admissible as a statement against interest.

Rule 804(b)(3) provides:

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil

> or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

A statement may be admitted under this rule if the declarant is unavailable; the statement is genuinely adverse to the declarant's penal interest; and "corroborating circumstances clearly indicate the trustworthiness of the statement." "The party offering the statement bears the 'formidable burden' of meeting the requirements of Rule 804(b)(3), and the court's decision on its admissibility is reviewed for abuse of discretion." *United States v. Bumpass*, 60 F.3d 1099, 1102 (4th Cir.1995) (quoting *United States v. MacDonald*, 688 F.2d 224, 233 (4th Cir.1982), *cert. denied*, 459 U.S. 1103, 103 S.Ct. 726, 74 L.Ed.2d 951 (1983)).

Having asserted his Fifth Amendment privilege against self-incrimination, Starkey was unavailable to Lowe. See Fed.R.Evid. 804(a)(1). The question of whether Starkey's statement to his counsel was adverse to his penal interests is a much closer question, and a question we need not decide because the district court did not abuse its discretion when it found the lack of sufficient "corroborating circumstances."

In *Bumpass*, we quoted from our decision in *United States v. Brainard*, 690 F.2d 1117 (4th Cir.1982), to explain the nature and purpose of corroborating circumstances under Rule 804(b)(3): The requirement of corroborating circumstances was designed to protect against the possibility that a statement would be fabricated to exculpate the accused. Thus, the Advisory Committee explained the requirement of corroborating circumstances as follows:

> [O]ne senses in the decisions a distrust of evidence of confessions by third persons offered to exculpate the

> accused arising from suspicions of fabrication either of the fact of the making of the confession or in its contents, enhanced in either instance by the required unavailability of the declarant.
>
> F.R.Evid. 804(b)(3), Advisory Committee Notes. The rule requires not a determination that the declarant is credible, but a finding that the circumstances clearly indicate that the statement was not fabricated. It is the statement rather than the declarant which must be trustworthy.

Bumpass, 60 F.3d at 1102 (quoting *Brainard*, 690 F.2d at 1124). The requirement of corroborating circumstances "need not 'remove all doubt with respect to the hearsay statement,' " *Id.* (quoting *Brainard*, 690 F.2d at 1125 n.14), but rather the requirement only mandates "corroborating circumstances 'clearly indicate the trustworthiness of the statement.' " *Id.* In *Bumpass*, we added these words of caution:

> But it must be remembered that admission of such hearsay leaves the party against whom it is offered without the important benefit of cross examination. The level of corroboration therefore must be sufficient that cross examination would add little to test the hearsay's reliability.

Id.

To assess the corroborating circumstances of a given statement, we look to:

> (1) whether the declarant had at the time of making the statement pled guilty or was still exposed to prosecution for making the statement, (2) the declarant's motive in making the statement and whether there was a reason for the declarant to lie, (3) whether the declarant repeated

> the statement and did so consistently, (4) the party or parties to whom the statement was made, (5) the relationship of the declarant with the accused, and (6) the nature and strength of independent evidence relevant to the conduct in question.

Id.

Working from the premise that Lowe has a "formidable burden" in establishing corroborating circumstances, we cannot conclude that the district court abused its discretion in refusing to admit Starkey's statement through his attorney. First, there was no evidence offered to corroborate the portion of Starkey's statement that, following the alleged purchase, the Colt Trooper Mark III pistol was taken out to Starkey's farm and remained there until Starkey relinquished control over it several months later. Second, although Starkey was arguably exposed to prosecution in light of his statement, Starkey and Lowe were union brethren, and Starkey had a clear motive to lie in this case: the government, through its theory of the shooting, could not place Starkey in the area in which the fatal shot originated.[9] Third, Starkey's statement contradicts a crucial uncontroverted fact in the case: the Colt Trooper Mark III pistol fired the fatal shot that killed York. When assessing the corroborating circumstances of a statement, a court can make an assessment of the evidence. *Id.* at 1103 ("Even though the assessment of such evidence is the responsibility of the jury in determining the defendant's guilt, such evidence may also be considered by the court when ruling on the trustworthiness of hearsay, an evidentiary question which is committed to the court for decision."). Fourth, cross-examination of Starkey would have undoubtedly tested the reliability of Starkey's statement to his attorney. *Id.* at 1102. In summary, we cannot conclude the district court abused its discretion in excluding Starkey's statement which was offered through his counsel.

IV

---

[9]Woods' testimony placed Starkey on the access road at the time of the ambush.

On three fronts, Lowe challenges the district court's jury instructions. We review the district court's jury instructions "in their entirety and as part of the whole trial." *United States v. Bostian*, 59 F.3d 474, 480 (4th Cir.1995). Our focus is on " 'whether the court adequately instructed the jury on the elements of the offense and the accused's defenses.' " *Id.* (quoting *United States v. Fowler*, 932 F.2d 306, 317 (4th Cir.1991)).

The relevant part of the instructions challenged by Lowe provides:

> I want to define a motor vehicle for you. Under Section 33, the definition of motor vehicle includes contrivances such as trucks which are used for commercial purposes on the highways in the transportation of passengers or property.
>
> A motor vehicle is used for commercial purposes if it is used for the carriage of persons or property directly or indirectly in connection with any business or other undertaking intended for profit.
>
> Combining those terms, for you to find the defendant guilty of violating Title 18, United States Code, Section 33, the government must, among other things, prove beyond a reasonable doubt that the trucks involved in this case were used to transport passengers or property directly or indirectly in connection with a business or other undertaking intended for profit by Arch of West Virginia, Elite Security, and Deskins Contracting, or any of them.
>
> Now, having defined motor vehicle for our purposes here, with respect to the offenses charged under Title 18, United States Code, Section 33, in addition to proving that the trucks are motor vehicles within the definition just provided, the government has the burden of proving

> that the trucks were used, operated, or employed in interstate commerce.
>
> The term "interstate commerce" means commerce between or among the states. It is not necessary, however, that the trucks being driven by employees of Elite Security and Deskins Contracting actually be traveling across state lines or from one state to another at the time of the offense or offenses charged in order to find that they were used, operated, or employed in interstate commerce.
>
> Rather, for purposes of Section 33, the interstate commerce requirement may be satisfied if the government has proved beyond a reasonable doubt that the trucks being driven by employees of Elite Security and Deskins Contracting were used or employed by Arch of West Virginia in connection with and in furtherance of its business of distributing coal mined in West Virginia to consumers in another state, or used or employed by Elite Security in connection with and in the course of conducting its business of providing security services outside the State of North Carolina.

(J.A. 1030-32).

Lowe argues that the district court's instructions "improperly focuse[d] on the interstate nature of the general business operations of Arch and Elite Security, without requiring that the *vehicles* themselves have some interstate nexus." Appellant's Brief at 19. This argument is easily disposed of. All the statute requires is that the vehicles be "used" in interstate commerce; in other words, as the district court stated, the vehicles must be used in connection with or in furtherance of the interstate market activities of the entities operating or employing the vehicles. Such was the case here. The vehicles were used in connection with and in furtherance of the interstate market activities of Arch and Elite.

Lowe also contends that the district court's instructions did not require the jury to find that the vehicles were being used in the transportation of passengers, passengers and property, or property and cargo. In his reply brief at 8, Lowe argues that "any suggestion that the government must prove that the vehicles were 'transporting either passengers or property' was negated by the instruction that 'the interstate commerce requirement may be satisfied if the government has proved ... that the trucks being driven by employees of Elite Security and Deskins Contracting were *used or employed by Arch of West Virginia in connection with and in furtherance of its business of distributing coal mined in West Virginia to consumers in another state, or used or employed by Elite Security in connection with and in the course of conducting its business of providing security services outside the State of North Carolina.*' "

Lowe's argument has no merit, as it confuses the motor vehicle component with the interstate commerce component of the statute. With respect to the definition of "motor vehicle," the district court's instructions were quite clear:

> [T]he definition of motor vehicle includes contrivances such as trucks which are used for commercial purposes on the highways in the transportation of passengers or property.

(J.A. 1030). Once the government established that the vehicles in question were motor vehicles, *e.g.*, that the vehicles transported passengers, the jury had to determine whether these vehicles were "used" in interstate commerce. Contrary to Lowe's protestations, § 33 requires no more than proof that the vehicles were used in furtherance of or in conjunction with the interstate activities of entities employing the vehicles.

Lowe's final contention is that the district court's jury instructions constructively amended the indictment in violation of *Stirone v. United States*, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960). Lowe argues that the district court's "jury instructions improperly permitted conviction on a theory never adopted by the grand jury: *i.e.*, that the vehicles were used in interstate commerce on July 22, 1993 because they were being

'used or employed *by Arch* ' in connection with its interstate mining business." Appellant's Brief at 21.

This argument has no merit. The indictment alleged violations of 18 U.S.C. § 33 by incorporating through reference the following factual predicate:

> (1) Arch was a corporation selling coal from the Ruffner Mine to various states in the United States;
>
> (2) Arch employed both Deskins and Elite to provide services; and
>
> (3) Deskins and Elite utilized motor vehicles.

(J.A. 13-15).

This factual predicate unquestionably served as an appropriate basis for the district court to instruct the jury that the interstate component of § 33 could be satisfied if the jury found that the vehicles "were used or employed by Arch of West Virginia in connection with and in furtherance of its business of distributing coal mined in West Virginia to consumers in another state." (J.A. 1031).

V

Lowe also raises one other argument which he contends should be resolved in his favor. He contends that the district court erred in its application of the Sentencing Guidelines. We have reviewed this assignment of error and find it to be without merit. For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED.

MOTZ, Circuit Judge, dissenting:

An employee of a West Virginia company, driving a truck, without passengers or cargo, that was titled in West Virginia and owned by his West Virginia employer, was fatally shot as he was leaving a West Virginia coal mine to return to his employer's West Virginia shop. Principal responsibility for this tragedy was attributed to appellant Jerry Dale Lowe.[1] But Lowe was not charged with murder, manslaughter, felonious wounding, assault, battery, or any other seemingly appropriate state law offense. Instead, he was charged with, and convicted of, violating a federal statute aimed at punishing those who damage commercial vehicles used in interstate commerce. *See* 18 U.S.C. § 33. The majority concludes that the government proved, as it had to, that all vehicles involved in this case, including that driven by the victim, were (1) "used for commercial purposes ... in the transportation of passengers ... or property or cargo" and (2) "used, operated, or employed in interstate or foreign commerce." 18 U.S.C. §§ 31, 33. I do not believe that either of these elements was proved, and so I respectfully dissent.[2]

To come within the reach of § 33, damage must be done to a "motor vehicle," which is defined as a:

> *carriage* or other contrivance propelled or drawn by mechanical power and *used for commercial purposes on the highways in the transportation of passengers, passengers and property, or property or cargo*[.]

18 U.S.C. § 31 (emphasis added).

The majority does not suggest that any of the vehicles involved in this case was used in the transportation of "property or cargo." The majority does assert, however, that "each of the vehicles was used 'in the

---

[1]Seven other miners were permitted to plead guilty to a petty state offense, destruction of property, and were sentenced to 120 days in prison and fined $500.

[2]I agree with the majority's well-reasoned conclusions as to the evidentiary and sentencing issues. I also agree that there was sufficient evidence presented at trial from which a jury could conclude that Lowe fired the shot that killed the decedent.

transportation of passengers.' " Maj. op. at 1143. I cannot find any evidence that any vehicle involved here was ever used for "*commercial* purposes" in the "transportation of passengers." The Elite vehicles were used to escort Deskins *vehicles* to and from the mine; although the Elite vehicles contained several Elite employees, there was no evidence that they were ever used to provide commercial transportation for Deskins employees or anyone else. The legislative history of § 33 strongly suggests that it was not intended to apply to vehicles in which employees of the vehicle owner were the only passengers, *i.e.*, that this does not constitute the "transportation of passengers" for "commercial purposes." *See* H.R.Conf.Rep. No. 2287, 84th Cong., 2d Sess. (1956), *reprinted* in 1956 U.S.C.C.A.N. 3145, 3151 (statute "*does not extend to motor vehicles*, including commercial motor vehicles, *used* merely for the transportation of property, or *for personal or private purposes*" (emphasis added)). Nor has any other court interpreted § 33 to apply to this or a similar situation; rather the statute has only been invoked in crimes involving vehicles engaged in true commercial, rather than private, purposes. *See, e.g., United States v. Lambert*, 994 F.2d 1088 (4th Cir.1993) (Greyhound bus); *United States v. Daniels*, 948 F.2d 1033 (6th Cir.1991) (same), *cert. denied*, 503 U.S. 912, 112 S.Ct. 1279, 117 L.Ed.2d 504 (1992); *United States v. Heightland*, 865 F.2d 94 (6th Cir.) (truck transporting coal in first phase of interstate shipment), *cert. denied*, 493 U.S. 826, 110 S.Ct. 90, 107 L.Ed.2d 55 (1989).

However, even if § 33 was intended to apply to vehicles in which the owner's employees were the only passengers, it would not apply to the two Deskins vehicles. It was undisputed that the Deskins vehicles--including the one containing the victim who was fatally shot--contained only one person, the driver himself. At least with regard to the Deskins vehicles then, there cannot be any claim that any passengers were transported for any purpose, let alone for commercial purposes. By definition, drivers are not passengers. *See also* S.Rep. No. 225, 98th Cong., 1st Sess. (1983), *reprinted* in 1984 U.S.C.C.A.N. 3182, 3500 (discussing the need for amending the definition of "motor vehicle" to include "property or cargo" because without this addition, the statute "does not reach the destruction of" single-driver commercial trucks since they carry "only cargo, not passengers"). Absent evidence that the

Deskins vehicles were ever used to transport "passengers," "property," or "cargo" as required by § 31, the convictions cannot stand.

Furthermore, to make out a violation of § 33, the "motor vehicles" that are damaged must also be "used, operated, or employed in interstate or foreign commerce." 18 U.S.C. § 33. The majority asserts that this requirement is satisfied because the vehicles were used to "further" the general business activities of Arch ("distribution of Arch's coal") and Elite ("Elite's business furnishing security services in the interstate market"). Maj. op. at 1143. No court has ever endorsed such a broad reading of § 33 and for good reason. The plain language of the statute clearly provides to the contrary.

First, only if a person damages a "motor vehicle which is used, operated, or employed in interstate ... commerce" is his conduct forbidden by § 33. Thus, the vehicles *themselves* must have some connection to interstate commerce. That the owners of the vehicles, Arch and Elite, were engaged generally in interstate activities is wholly irrelevant. *See United States v. Voss*, 787 F.2d 393, 395 (8th Cir.) (statute broader than § 33, which punishes anyone who commits arson on "property used in ... or ... affecting interstate or foreign commerce," held to require evidence "that the *building* [which was burned] was used in an activity affecting interstate commerce" rather than merely that the building owner was engaged in interstate commerce (emphasis added)), *cert. denied*, 479 U.S. 888, 107 S.Ct. 286, 93 L.Ed.2d 261 (1986).

Furthermore, § 33 requires that motor vehicles must be "used in" interstate commerce, not just "affect" interstate commerce. The Supreme Court has recognized three categories of statutes enacted by Congress pursuant to its constitutional authority to regulate interstate commerce:

> The Commerce Clause reaches, in the main, three categories of problems. First, the use of channels of interstate or foreign commerce which Congress deems are being misused, as, for example, the shipment of stolen goods or of persons who have been kidnaped. Second, protection of the *instrumentalities of interstate commerce*, as, for example, the destruction of an

> aircraft, or persons or things in commerce, as, for example, thefts from interstate shipments. Third, those activities affecting commerce.

Perez v. United States, 402 U.S. 146, 150, 91 S.Ct. 1357, 1359, 28 L.Ed.2d 686 (1971) (emphasis added) (citations omitted). As the Court has repeatedly emphasized, Congress is aware of the "distinction between legislation limited to activities 'in commerce,' and an assertion of its full Commerce Clause power so as to cover all activity *substantially affecting interstate commerce*." *United States v. American Bldg. Maint. Indus.*, 422 U.S. 271, 280, 95 S.Ct. 2150, 2156, 45 L.Ed.2d 177 (1975) (emphasis added). Thus, the phrase "in commerce" is a more narrow and restrictive jurisdictional requirement than the phrase "affecting interstate commerce," and denotes "only persons or activities *within the flow of interstate commerce*–the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer." *Id.* at 276, 95 S.Ct. at 2154 (emphasis added) (quoting *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 195, 95 S.Ct. 392, 398, 42 L.Ed.2d 378 (1974)). Had Congress wanted to include in § 33 vehicles that are merely used to "further" or "affect" interstate commerce, it could easily have done so. It did not. *Compare* 18 U.S.C. § 844(I) (applying to vehicles "used in interstate or foreign commerce *or in any activity affecting interstate or foreign commerce* " (emphasis added)).

The jurisdictional phrase "used, operated, or employed in interstate or foreign commerce" appears in only two other sections of the Code. Section 32 of Title 18, enacted along with § 33 in 1956, provides for federal prosecution of anyone who "sets fire to, damages, destroys, disables, or wrecks ... any civil aircraft used, operated, or employed in interstate, overseas, or foreign air commerce." 18 U.S.C. § 32. Sections 32 and 33 in turn adopted the language of 18 U.S.C. § 1992, which authorizes prosecution of anyone who "willfully derails, disables, or wrecks any train, engine, motor unit, or car used, operated, or employed in interstate or foreign commerce by any railroad." See H.R.Rep. No. 1979, 84th Cong., 2d Sess. (1956), *reprinted* in 1956 U.S.C.C.A.N. 3145. In both § 32 and § 1992, Congress was concerned with protecting certain channels and instrumentalities of interstate commerce, *e.g.*, trains

and aircraft. Section 33 merely extended that protection to "motor vehicles ... used, operated, or employed in interstate or foreign commerce." *See, e.g., Lambert*, 994 F.2d 1088 (Greyhound bus); *Daniels*, 948 F.2d 1033 (same); *Heightland*, 865 F.2d 94 (truck transporting coal in first phase of interstate shipment); *see also* 1984 U.S.C.C.A.N. at 3500 ("there is a definite Federal interest in keeping open the channels of interstate commerce in which trucks play a critical role").

The vehicle that the decedent was driving was owned and operated by a West Virginia company in connection with an intrastate business transaction with another West Virginia company. There was no evidence that the vehicle had ever been used outside the state of West Virginia, in connection with interstate commerce or otherwise. The statute as interpreted by the majority would extend the reach of § 33 to every vehicle owned by a person or entity engaged in interstate commerce, no matter how confined the use of the vehicle, because conceivably every such vehicle somehow "furthers" the interstate market activities of its owner. I do not believe Congress intended to stretch the scope of § 33 in such a manner.

In light of the recent efforts towards "de-federalization," it is surprising that the majority chooses to convert what would otherwise be a classic state- law offense, with strong local overtones, into a federal crime. In other contexts, the Supreme Court has warned against such statutory interpretation. See *United States v. Bass*, 404 U.S. 336, 350, 92 S.Ct. 515, 524, 30 L.Ed.2d 488 (1971) ("[T]he broad construction urged by the Government renders traditionally local criminal conduct a matter for federal enforcement and would also involve a substantial extension of federal police resources. Absent proof of some interstate commerce nexus in each case, [the statute] dramatically intrudes upon traditional state criminal jurisdiction." (citations omitted)). Nor does the fact that this tragedy occurred during a vitriolic labor strike somehow provide a basis for federal jurisdiction. The Supreme Court has also cautioned against this:

> [I]t would require statutory language much more explicit than that before us here to lead to the conclusion that Congress intended to put the Federal Government in the

> business of policing the orderly conduct of strikes. Neither the language of [the statute] nor its legislative history can justify the conclusion that Congress intended to work such an extraordinary change in federal labor law or such an unprecedented incursion into the criminal jurisdiction of the States.

United States v. Enmons, 410 U.S. 396, 411, 93 S.Ct. 1007, 1015, 35 L.Ed.2d 379 (1973).

For all of these reasons, I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
November 24, 1995

No. 94-5713
CR-93-267

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

JERRY DALE LOWE,

Defendant - Appellant

On Petition for Rehearing with Suggestion for Rehearing In Banc

---

Appellant filed a petition for rehearing with suggestion for rehearing in banc.

Judges Niemeyer, Hamilton and Motz voted to deny the petition for rehearing.

A member of the Court requested a poll on the suggestion for rehearing in banc, and a majority of the judges voted to deny rehearing in banc.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Hamilton for the Court.

For the Court,

/s/ Bert M. Montague
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
December 4, 1995

No. 94-5713
CR-93-267

US v. Lowe

MANDATE

The judgment of this Court dated 9/20/95 takes effect today.

BERT M. MONTAGUE
CLERK

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA NOVEMBER 2, 1993, GRAND JURY 92-1 CHARLESTON

UNITED STATES OF AMERICA

v. **CRIMINAL NO. CR-93-267**
18 U.S.C. § 371
18 U.S.C. § 33
18 U.S.C. § 2
18 U.S.C. § 924(c)(1)

JERRY DALE LOWE
EARNEST LEE WOODS
FREDERICK DEXTER CARVER
DAYNOR J. ADKINS
CURTIS R. BROWNING
JERRY E. MAY
LARRY RAY PERRY
LUTHER SHELL

INDICTMENT

The Grand Jury charges:

COUNT ONE

1. At all times material hereto:

a. APOGEE Coal Company doing business as Arch of West Virginia (hereinafter, "Arch") is and was a Delaware corporation engaged in the business of mining and selling coal. In connection with the mining and selling of coal, Arch owned and operated a coal mine (hereinafter, "the Ruffner Mine") at or near Slab Fork Hollow Road, at or near Yolyn, Logan County, West Virginia.

b. Arch is and was engaged in the mining and distribution of coal from the Ruffner Mine. The coal mined from the Ruffner mine is distributed through interstate commerce to various states in the United States.

c. The Ruffner Mine is and was a unionized operation; that is, the hourly employees of the Mine were represented by Local 5958 of the United Mine Workers of America (hereinafter, "the Union").

d. During the Summer of 1993, the Union was engaged in a labor dispute with Arch.

e. During the course of the labor dispute, the Union had pickets stationed at or near the Slab Fork Hollow Road entrance to the Ruffner Mine.

f. Persons acting on behalf of the Union held training sessions for all members of the Union regarding appropriate and inappropriate striking activities. Members of the Union were instructed that acts of violence, including attacks on motor vehicles owned and operated by Arch or by contractors on their behalf, constituted improper and unlawful picket conduct. Members of the Union were also instructed that firearms were not allowed on the picket line.

g. The defendant, **EARNEST LEE WOODS,** was the President of Local 5958 of the Union.

h. The defendant, **JERRY DALE LOWE,** acted as a strike captain; that is, a person with primary responsibility for picket conduct during a shift of picket duty.

i. The defendant, **FRED DEXTER CARVER,** also acted as a picket strike captain.

j. The defendants, **DAYNOR J. ADKINS, CURTIS R. BROWNING, JERRY E. MAY, LARRY RAY**

PERRY, AND LUTHER SHELL, were members of the Union who served picket duty at the Slab Fork entrance to the Mine.

k. All of the defendants received the strike training described in subparagraph (f) above.

l. Elite Security (hereinafter "Elite") is a North Carolina corporation engaged in providing security services. Elite operates in various states and is involved in interstate commerce. Elite was hired by Arch to provide security at the Ruffner Mine. One of Elite's responsibilities was to provide transport escorts to Arch employees and suppliers. In connection with its business operations Elite used, operated, and employed motor vehicles.

m. During the Summer of 1993, Russell L. Deskins owned and operated Deskins Contracting (hereinafter "Deskins") a business hired by Arch to provide environmental services at the Ruffner Mine. Deskins operates in various states and is involved in interstate commerce. In connection with it's business operations, Deskins used, operated, and employed motor vehicles.

n. On or about July 22, 1993, Deskins' employees were removing sludge from a sediment pond at the Ruffner Mine.

o. On or about July 22, 1993, the defendants, **JERRY DALE LOWE, FREDERICK DEXTER CARVER, DAYNOR J. ADKINS, CURTIS R. BROWNING, JERRY E. MAY, LARRY RAY PERRY, AND LUTHER SHELL** were picketing at or near the Slab Fork entrance to the Ruffner Mine.

p. On or about July 22, 1993, the defendant **JERRY DALE LOWE,** upon learning that Deskins employees were removing sludge from a sediment pond at the Ruffner Mine, telephonically called the residence of defendant **EARNEST LEE WOODS,** President of Local 5958.

q. On or about July 22, 1993, the defendant **EARNEST LEE WOODS** traveled to the picket site at or near the Slab Fork entrance to the Ruffner Mine.

2. On or about July 22, 1993, at or near Slab Fork Hollow Road , Logan County, West Virginia, and within the Southern District of West Virginia and elsewhere, the defendants, **EARNEST LEE WOODS, JERRY DALE LOWE, FREDERICK DEXTER CARVER, DAYNOR J. ADKINS, CURTIS R. BROWNING, JERRY E. MAY, LARRY RAY PERRY, AND LUTHER SHELL,** and other persons whose identities are both known and unknown to the Grand Jury, did knowingly combine, conspire, confederate and agree and have a tacit understanding with each other to commit offenses against the United States, that is, to violate Title 18, United States Code, Section 33, that is, with reckless disregard for the safety of human life, to knowingly and willfully disable and incapacitate the driver and damage and disable and attempt to damage and disable motor vehicles which were being used, operated and employed in interstate commerce.

3. On or about July 22, 1993, and in order to effectuate and accomplish the objects and purposes of the conspiracy, defendants, **EARNEST LEE WOODS, JERRY DALE LOWE, FREDERICK DEXTER CARVER, DAYNOR J. ADKINS, CURTIS R. BROWNING, JERRY E. MAY, LARRY RAY PERRY, and LUTHER SHELL,** and other persons whose identities are both known and unknown to the Grand Jury, did commit and cause to be committed the following overt acts within the Southern District of West Virginia:

a. The defendants and persons whose identities are both known and unknown to the Grand Jury gathered together devices designed and intended to damage and disable motor vehicles, commonly known as rocks, jack rocks, jack plates, and molotov cocktails to be used to damage and disable vehicles operated by Deskins or Elite when they attempted to exit the Ruffner Mine site.

b. The defendants and persons whose identities are both known and unknown to the Grand Jury also armed themselves

with rocks, slingshots and firearms for use in the ambush of Elite and Deskins vehicles attempting to exit the Ruffner Mine site.

c. The defendant, **JERRY DALE LOWE,** armed himself with a Colt Trooper Mark III pistol, Serial Number 30259U.

d. On or about July 22, 1993, the defendants and others both known and unknown to the Grand Jury positioned themselves around the Slab Fork entrance to the Ruffner Mine site to await the exit of Elite and Deskins vehicles.

e. On or about July 22, 1993, when Deskins and Elite vehicles attempted to leave the Ruffner Mine site through the Slab Fork entrance, the defendants and others both known and unknown to the Grand Jury hurled rocks at said vehicles in a effort to damage and disable the vehicles.

f. On or about July 22, 1993, defendant **JERRY DALE LOWE** discharged the Colt Trooper Mark III .357 caliber magnum revolver, Serial Number 30259U, striking and killing John Edward York, a/k/a "Eddie York," the driver of a Deskins vehicle.

g. On or about July 22, 1993, defendant **JERRY DALE LOWE** discharged a firearm striking a vehicle operated by an Elite employee.

ALL IN VIOLATION OF TITLE 18, UNITED STATES CODE, SECTION 371.

COUNT TWO

1. Each and every allegation of paragraph 1 of Count One is incorporated by reference as if each and every allegation is set forth herein.

2. On or about the July 22, 1993, at or near Slab Fork Hollow Road, Logan County, West Virginia, and within the Southern District of West Virginia, the defendants, **EARNEST LEE WOODS, JERRY DALE LOWE, FREDERICK DEXTER CARVER, DAYNOR J. ADKINS, CURTIS R. BROWNING, JERRY E. MAY, LARRY RAY PERRY, and LUTHER SHELL,** aided and abetted by each other, with reckless disregard for the safety of human life, did knowingly and willfully damage and disable and attempt to damage and disable motor vehicles which were being used, operated, and employed in interstate commerce; in violation of Title 18, United States Code, Sections 33 and 2.

COUNT THREE

1. Each and every allegation of paragraph 1 of Count One is incorporated by reference as if each and every allegation is set forth herein.

2. On or about the July 22, 1993 , at or near Slab Fork Hollow Road, near Yolyn, Logan County, West Virginia, and within the Southern District of West Virginia, the defendant, **JERRY DALE LOWE,** with reckless disregard for the safety of human life, did knowingly and willfully disable and incapacitate the driver of a motor vehicle which was being used, operated, and employed in interstate commerce, by the use of a firearm; in violation of Title 18, United States Code, Section 33.

COUNT FOUR

On or about the July 22, 1993, at or near Slab Fork Hollow Road, Logan County,, West Virginia, in the Southern District of West Virginia, the defendant, **JERRY DALE LOWE,** knowingly used and carried a firearm, namely, a Colt Trooper Mark III .357 caliber magnum revolver, Serial Number 30259U during and in relation to a crime of violence for which he may be prosecuted in a court of the United States, that is, Title 18, United States Code, Section 33, that is, with reckless disregard for the safety of human life, he did knowingly and willfully disable and incapacitate the driver and damage and disable and attempt to damage and disable a motor vehicle which was used, operated, and employed in interstate commerce; in violation of Title 18, United States Code, Section 924(c)(1).

A True Bill.

_____

Foreperson

CHARLES T. MILLER
United States Attorney

By:_____
Assistant United States Attorney

Supreme Court, U.S.
FILED
JUL 12 1996
CLERK

No. 95-1659

In the Supreme Court of the United States

OCTOBER TERM, 1995

JERRY DALE LOWE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
DAVID S. KRIS
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's convictions for conspiring to damage a motor vehicle used in interstate commerce, and to disable its driver, in violation of 18 U.S.C. 371; aiding and abetting the damaging of such a vehicle, in violation of 18 U.S.C. 33 and 2; and disabling the driver of such a vehicle, in violation of 18 U.S.C. 33.

2. Whether the court of appeals erred in affirming the district court's exclusion of evidence under Federal Rule of Evidence 801(d)(1)(B), and in finding no plain error in the district court's refusal to admit evidence under Federal Rule of Evidence 804(b)(3).

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	2
Statement	2
Argument	10
Conclusion	18

TABLE OF AUTHORITIES

Cases:

Hamling v. *United States*, 418 U.S. 87 (1974)	14
Russell v. *United States*, 471 U.S. 858 (1985)	13
Tome v. *United States*, 115 S. Ct. 696 (1995)	15
United States v. *Asher*, 854 F.2d 1483 (3d Cir. 1988), cert. denied, 488 U.S. 1029 (1989)	15
United States v. *Azure*, 801 F.2d 336 (8th Cir. 1986)	16
United States v. *Bishop*, 66 F.3d 569 (3d Cir.), cert. denied, 116 S. Ct. 681 (1995) & 116 S. Ct. 750 (1996)	14
United States v. *Casoni*, 950 F.2d 893 (3d Cir. 1991)	17
United States v. *Gonzalez*, 700 F.2d 196 (5th Cir. 1983)	16
United States v. *Heightland*, 865 F.2d 94 (6th Cir.), cert. denied, 493 U.S. 826 (1989)	13, 14
United States v. *Monholland*, 607 F.2d 1311 (10th Cir. 1979)	12
United States v. *Montague*, 958 F.2d 1094 (D.C. Cir. 1992)	16-17
United States v. *Robertson*, 115 S. Ct. 1732 (1995)	11
United States v. *Shively*, 927 F.2d 804 (5th Cir.), cert. denied, 501 U.S. 1209 (1991)	13

Cases—Continued: Page

United States v. *Voss*, 787 F.2d 393 (8th Cir.), cert. denied, 479 U.S. 888 (1986) 12, 13
United States v. *Weil*, 561 F.2d 1109 (4th Cir. 1977) 8
United States v. *White*, 11 F.3d 1446 (8th Cir. 1993) 15

Constitution, statutes and rules:

U.S. Const. Art. I, § 8, Cl. 3 (Commerce Clause) 11
18 U.S.C. 2 2
18 U.S.C. 31 ..... 6, 9, 10, 11
18 U.S.C. 33 (1988) 10
18 U.S.C. 33 ..... 2, 6, 7, 9, 10, 11, 12, 14
18 U.S.C. 371 2
18 U.S.C. 844(i) 12
18 U.S.C. 924(c) 2
Fed. R. Evid.:
Rule 801(d)(1)(B) 8, 14, 15, 16, 17
Rule 804(b)(3) 4, 5, 8, 9, 17

Miscellaneous:

Jean F. Rydstrom, Annotation, *Effect of Rule 801(d)(1)(B) of the Federal Rules of Evidence Upon the Admissibility of a Witness' Prior Consistent Statement*, 47 A.L.R. Fed. 639 (1980) ... 16

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1659

JERRY DALE LOWE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-26) is reported at 65 F.3d 1137.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 1995. A petition for rehearing was denied on November 24, 1995. Pet. App. 27-28. The petition for a writ of certiorari was filed on February 22, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of West Virginia, petitioner was convicted on one count of conspiring to

damage a motor vehicle used in interstate commerce, and to disable its driver, in violation of 18 U.S.C. 371; one count of aiding and abetting the damaging of a motor vehicle used in interstate commerce, in violation of 18 U.S.C. 33 and 2; one count of disabling the driver of a motor vehicle used in interstate commerce, in violation of 18 U.S.C. 33; and one count of using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c). He was sentenced to 131 months' imprisonment, to be followed by three years' supervised release, and ordered to pay $6,318.50 in restitution to the family of one of his victims. Gov't C.A. Br. 4-5. The court of appeals affirmed. Pet. App. 1-26.

1. Petitioner, a member of the United Mine Workers of America (UMWA), participated in a strike at the Ruffner Coal Mine in West Virginia during 1993. Petitioner and other members of the local union established a picket line on Slab Fork Hollow Road, near the mine. On July 22, 1993, four trucks were attacked by the pickets as they drove along the road, and the driver of one of the trucks was shot and killed. Petitioner admitted attacking the vehicles in concert with other pickets, and the evidence showed that he fired the fatal shot.

a. Before the strike, the Ruffner Mine's owner, Apogee Coal Company, d/b/a Arch of West Virginia, had been cited by state authorities for environmental hazards at a sediment pond located on Slab Fork Hollow Road. In response to the citations, Arch hired the Deskins Contracting Company of West Virginia to clear sludge from the pond. Arch also hired Elite Security, a North Carolina company, to protect the Deskins employees from the striking miners. Pet. App. 1-2; Gov't C.A. Br. 7 & n.2.

On July 22, 1993, two Deskins employees, Marion Hensley and John York, drove two pickup trucks past the picket line to the sediment pond. Petitioner arrived at the picket line shortly thereafter. When he learned that the Deskins employees had driven past, petitioner went home, telephoned the president of the local union, and insisted that he join the picket line. Petitioner then drove back to the picket line himself. Pet. App. 2-3; Gov't C.A. Br. 7.

That afternoon, several Elite employees were assigned to drive to the pond in two vehicles and escort the Deskins employees past the pickets and back to the mine. As the security guards drove by the picket line on their way to the sediment pond, one of their vehicles was hit with a steel ball fired from a slingshot. Shortly thereafter, the pickets heard a loud noise, which may have been a backfire, but which some of the pickets apparently believed was a gunshot fired from one of the security vehicles. The pickets agreed to ambush the security vehicles on their return trip from the pond. Petitioner prepared for the ambush by hiding in a nearby wooded area. Pet. App. 3-4; Gov't C.A. Br. 7-8.

As the four vehicles were returning along the road from the pond, they were attacked. One of the security vehicles and the Deskins truck being driven by Hensley had their windshields smashed by rocks. The other security vehicle was hit with a bullet, although the driver was not injured. York, the driver of the other Deskins truck, was shot in the head and killed after the bullet passed through the rear window of his vehicle. That night, petitioner admitted to police officers that he had participated in the rock attack, but denied shooting York. Pet. App. 4-5.

The evidence at trial showed that petitioner had shot York. A week or two before the ambush, petitioner had obtained a Colt pistol from his nephew, William Lowe; petitioner was seen with the pistol on the picket line the day before the ambush. It was uncontroverted at trial that the Colt pistol had fired the shot that killed York. Just before the ambush, petitioner emerged from the woods with a BB-gun and brought it to his truck, saying that it was "worthless" and that he would be better off throwing a rock. An expert witness testified that the bullet that killed York came from the wooded area where petitioner had hidden. Pet. App. 3-6, 9-10.

b. At trial, the district court excluded two pieces of evidence offered by petitioner. First, the court excluded petitioner's statement to his nephew, William Lowe, that he had sold the Colt pistol several days before the shooting. Petitioner acknowledged that the statement was hearsay, but offered it during his own testimony under Federal Rule of Evidence 804(b)(3) as a statement against his penal interest. The district court excluded the statement after concluding that it was in petitioner's penal interest, rather than against it. Pet. App. 10.

The court also excluded a statement by Lawton Jack Starkey, one of the pickets who had participated in the ambush, that Starkey had purchased the Colt pistol from petitioner.[1] Petitioner offered the state-

---

[1] Starkey allegedly made that statement to his attorney, John Kessler, who turned over the Colt pistol to the government before the trial. Pet. App. 5, 13. At trial, Starkey invoked his right against compelled self-incrimination. *Id.* at 14. Petitioner subpoenaed Kessler (C.A. App. 73) to testify about Starkey's statements to him, but the district court granted Kessler's motion to quash and the government's

ment under Rule 804(b)(3), arguing that it was against Starkey's penal interest to admit that he possessed the gun.[2] The district court excluded Starkey's statement, finding that, even if it were against his penal interest, it was offered to exculpate petitioner and did not satisfy Rule 804(b)(3)'s requirement that "corroborating circumstances clearly indicate the trustworthiness of [such an exculpatory] statement." See Pet. App. 13-16.

Despite those evidentiary rulings, petitioner was able to present evidence regarding the Colt pistol. Petitioner testified that he had obtained the pistol from his nephew a week or two before the shooting; that he had offered to sell it to various union members prior to the shooting; that he had sold the gun to Starkey more than a week before the shooting; that he had never seen it again; and that he had had possession of the gun altogether for "at the most three hours." C.A. App. 784-785; see Gov't C.A. Br. 37. Petitioner's nephew testified that he had transferred

---

corresponding motion in limine. *Id.* at 758-762; see Pet. App. 13; Gov't C.A. Br. 40-41. The court based its decision on hearsay principles, and did not discuss any issue of attorney-client privilege. See C.A. App. 758-762.

[2] Rule 804(b)(3) provides that, where the declarant is unavailable as a witness, an out-of-court statement is not excluded by the hearsay rule if

> at the time of its making * * * [it] so far tended to subject the declarant to civil or criminal liability * * * that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

the gun to petitioner, and that he had tried to retrieve the gun from petitioner before the shooting, but had been unable to do so. C.A. App. 811-812; Pet. App. 12-13; see Gov't C.A. Br. 37.

c. The jury was instructed that, to convict petitioner under 18 U.S.C. 33, "[i]t is not necessary * * * that the trucks being driven by employees of Elite Security and Deskins Contracting actually be traveling across state lines or from one state to another." C.A. App. 1031. Instead, the district court instructed the jury, "the interstate commerce requirement [of Section 33] may be satisfied if the government has proved beyond a reasonable doubt that the trucks * * * were used or employed by Arch of West Virginia in connection with and in furtherance of its business of distributing coal mined in West Virginia to consumers in another state, or used or employed by Elite Security in connection with and in the course of conducting its business of providing security services outside the State of North Carolina." *Id.* at 1031-1032.

2. a. The court of appeals affirmed petitioner's convictions. Pet. App. 1-26. Petitioner argued that the trucks driven by the Deskins and Elite employees were not "motor vehicles" because they were not "used * * * in the transportation of passengers, passengers and property, or property and cargo." 18 U.S.C. 31. The court rejected that claim, concluding that "each of the vehicles was used 'in the transportation of passengers'" because "[t]he Elite vehicles were used to escort the Deskins employees * * * and the vehicles used by Deskins were used to transport workers for Deskins." Pet. App. 9 (quoting 18 U.S.C. 31). Therefore, the court concluded, "the

vehicles in the convoy were 'motor vehicles' within the meaning of the statute." *Ibid.*

Petitioner also claimed that the trucks were not "used, operated, or employed in interstate or foreign commerce," as required by Section 33. The court of appeals rejected that claim as well, explaining that Arch sold coal in several States, that Deskins was a West Virginia company doing business in both West Virginia and Kentucky, and that Elite was a North Carolina company working at the mine in West Virginia. See Pet. App. 1-2 & n.3. The court explained that the ambushed vehicles "were used to further the distribution of Arch's coal to interstate markets; indeed, without the assistance of Elite and Deskins, it is likely the Arch mine would have had to cease its operations permanently. Furthermore, the vehicles were used in furtherance of Elite's business of furnishing security services in the interstate market." *Id.* at 9. Thus, the court of appeals had "no difficulty concluding the vehicles in the convoy were used in interstate commerce at the time of the attack." *Ibid.*

The court also found sufficient evidence that petitioner had killed York. It summarized the evidence as follows:

> First, * * * it was uncontroverted at trial that the Colt Trooper Mark III pistol fired the fatal shot that killed York. Second, [petitioner], within days prior to the shooting, possessed the Colt Trooper Mark III pistol at the picket site. Third, shortly before the attack, [petitioner] was seen in possession of a BB-gun, but complained it was worthless for an attack on the vehicles; [petitioner] then took the BB-gun back to his truck—

> the same truck in which he had been seen carrying the Colt Trooper Mark III pistol. Fourth, there is evidence in the record from which the jury could find that [petitioner] fired the fatal shot. In this regard, [an expert witness's] testimony established a cone-shaped area from which the fatal shot originated and the circumstantial evidence, namely, the evidence that the shot came from the creek side of the road in the area [petitioner] positioned himself for the ambush and the discovery of the Budweiser Light beer can within the conical area described by [the expert witness], placed [petitioner] in the area described by [the expert].

Pet. App. 9-10.

b. The court of appeals rejected petitioner's challenge to the district court's evidentiary rulings. Petitioner abandoned the contention that his statement to William Lowe was admissible as against his penal interest under Rule 804(b)(3). Instead he argued that the statement should have been admitted as a prior consistent statement used to rebut a charge of recent fabrication under Rule 801(d)(1)(B). Reviewing for plain error because petitioner had not presented the theory at trial, the court of appeals rejected that claim. The court explained that "[c]orroborative testimony consisting of prior, consistent statements is ordinarily inadmissible unless the testimony sought to be bolstered has first been impeached." Pet. App. 12 (quoting *United States* v. *Weil*, 561 F.2d 1109, 1111 (4th Cir. 1977)). Because no prior attempt had been made to impeach petitioner's testimony, the court concluded that his prior consistent statement was not admissible under Rule 801(d)(1)(B). The court noted, moreover, that the

district court had admitted substantially equivalent evidence during the direct examination of petitioner's nephew. Pet. App. 11-13.

The court also held that the district court had properly excluded Starkey's hearsay statement that he had purchased the Colt pistol from petitioner. Although the court acknowledged that "whether Starkey's statement * * * was adverse to his penal interests is a * * * close[] question," Pet. App. 14, it held that the district court had not abused its discretion in concluding that "corroborating circumstances [did not] clearly indicate the trustworthiness of the statement," as required by Rule 804(b)(3) when a statement against penal interest is "offered to exculpate the accused." See Pet. App. 14-16; note 2, *supra*.

c. Judge Motz dissented, concluding that petitioner's actions did not violate Section 33. In her view, the Deskins trucks were not "motor vehicles" as defined in Section 31 because they were not used to transport passengers, but only their drivers. Pet. App. 21-23. Judge Motz also concluded that the trucks were not used "in commerce," as required by Section 33. Pet. App. 23-26. She explained that in her view Section 33 requires "the vehicles *themselves* [to] have some connection to interstate commerce," and she found it "wholly irrelevant" that "the owners of the vehicles, Arch and Elite, were engaged generally in interstate activities." *Id.* at 23.

ARGUMENT

1. Petitioner again challenges (Pet. 7-26) his convictions under 18 U.S.C. 33. That statute makes it a federal crime to damage "any motor vehicle which is used, operated, or employed in interstate or foreign commerce."[3] Under 18 U.S.C. 31, a "motor vehicle" is defined as "every description of carriage or other contrivance propelled or drawn by mechanical power and used for commercial purposes on the highways in the transportation of passengers, passengers and property, or property and cargo." The term "used for commercial purposes" is further defined by Section 31 to mean "the carriage of persons or property for any fare, fee, rate, charge or other consideration, or

---

[3] Section 33 provides, in relevant part:

> Whoever willfully, with intent to endanger the safety of any person on board or anyone who he believes will board the same, or with a reckless disregard for the safety of human life, damages, disables, destroys, tampers with, or places or causes to be placed any explosive or other destructive substance in, upon, or in proximity to, any motor vehicle which is used, operated, or employed in interstate or foreign commerce, or its cargo or material used or intended to be used in connection with its operation; or
>
> * * * * *
>
> Whoever, with like intent, willfully disables or incapacitates any driver or person employed in connection with the operation or maintenance of the motor vehicle, or in any way lessens the ability of such person to perform his duties as such; * * *
>
> * * * * *
>
> shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

18 U.S.C. 33 (1988).

directly or indirectly in connection with any business, or other undertaking intended for profit."

a. Petitioner contends (Pet. 9-12) that the trucks in this case were not "motor vehicles" under Section 31 because they were not "used * * * in the transportation of passengers."[4] Petitioner argues that the driver of a motor vehicle cannot be a "passenger" within the meaning of Section 31. The court of appeals correctly rejected that contention, because the Deskins trucks were used to transport the Deskins employees to and from the sediment pond. Nothing in the language of Section 31 suggests an intent to exclude vehicles containing only a driver where (as here) the driver is using the vehicle to transport himself "directly or indirectly in connection with any business." York not only drove the truck, but was its passenger because the purpose of the trip was to transport him from the mine site to the Deskins shop. Petitioner does not contend that the court of appeals' holding conflicts with any other published decision on this issue. Further review is unwarranted.

b. Petitioner also contends (Pet. 12-18) that the vehicles in this case were not "used, operated, or employed in interstate or foreign commerce," as required by Section 33.[5] As the court of appeals concluded (Pet. App. 9), however, Arch, Deskins, and Elite were all companies that engaged "in" interstate commerce because they bought and sold goods and services in more than one State. See *United States* v. *Robertson*, 115 S. Ct. 1732, 1733 (1995) (per curiam) ("a

---

[4] Petitioner does not dispute any other element of the definition. See Pet. 9-12; Pet. App. 9.

[5] Petitioner does not claim that Congress lacks the power to proscribe his conduct under the Commerce Clause.

corporation is generally engaged in commerce when it is itself directly engaged in the production, distribution, or acquisition of goods and services in interstate commerce") (internal quotation marks omitted). The vehicles in this case were all used in furtherance of the companies' respective interstate commercial activities. Thus, as the court of appeals concluded, they were used "in commerce" within the meaning of Section 33.

Petitioner contends (Pet. 16) that the decision below conflicts with decisions interpreting the federal arson statute, 18 U.S.C. 844(i), which makes it a federal crime to damage or destroy by means of fire or an explosive "any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." He relies on *United States* v. *Monholland*, 607 F.2d 1311 (10th Cir. 1979), and *United States* v. *Voss*, 787 F.2d 393 (8th Cir.), cert. denied, 479 U.S. 888 (1986), both of which reversed convictions under Section 844(i). Those cases are distinguishable, however, because they involved no direct connection between the prohibited arson and interstate commerce.

In *Monholland*, the court held that a pick-up truck used by a state judge for commuting to and from the local courthouse was not a "vehicle * * * used * * * in any activity affecting interstate or foreign commerce" covered by Section 844(i). The court explained that "[t]he vehicle in question was not even used on official business," and that "[t]he important problem here is that movement to and from work is an activity which ordinarily has an existence independent from the work. It does not blend into and become a part of the career." 607 F.2d at 1316. In the instant

case, by contrast, the trucks were "used to further the distribution of Arch's coal to interstate markets" and "in furtherance of Elite's business of furnishing security services in the interstate market." Pet. App. 9.[6]

In *Voss*, the jury was instructed that a building destroyed by arson was "used * * * in an[] activity affecting * * * commerce" if its owner had "purchased insurance from an insurance carrier doing business in [another] state." 787 F.2d at 396 n.1. The court of appeals held that the instruction was inadequate "because it requires a nexus only between interstate commerce and the owner of the building, not the building itself." *Id.* at 396. The instruction was defective, the court explained, because "it does not ask whether the insurance was purchased for the * * * property [that was to be burned]," rather than for some other piece of property owned by the real estate company. *Ibid.* In the present case, by contrast, the vehicles in question were not simply owned by a company engaged in interstate commerce; they were used directly in furtherance of the company's interstate business, and were so employed at the time of petitioner's attack.

Petitioner cites no decision suggesting that a vehicle is used "in interstate commerce" only if it actually travels across state lines. To the contrary, the decision below is consistent with the only other reported court of appeals decision directly addressing this issue. In *United States* v. *Heightland*, 865 F.2d

---

[6] In any event, *Monholland* is of questionable validity after this Court's decision in *Russell* v. *United States*, 471 U.S. 858 (1985). See *United States* v. *Shively*, 927 F.2d 804, 808 (5th Cir.), cert. denied, 501 U.S. 1209 (1991).

94 (6th Cir.), cert. denied, 493 U.S. 826 (1989), a Kentucky coal mine hired trucks to transport coal from the mine to a tipple facility, also located in Kentucky, where it was loaded onto rail cars and transported to Virginia for sale. The defendants attacked the trucks as they were returning from the tipple facility to the mine, and the court of appeals affirmed their convictions for violating Section 33. The court explained that, while the trucks were not "moving from one state to another" when they were attacked, they were within the reach of the statute because they were being used to further the interstate business of the coal mine "as the first phase of the truck-train interstate journey from" Kentucky to Virginia. *Id.* at 96; see *United States* v. *Bishop*, 66 F.3d 569, 589 (3d Cir.) (discussing *Heightland*), cert. denied, 116 S. Ct. 681 (1995) & 116 S. Ct. 750 (1996). This Court's review is therefore not warranted.

2. Petitioner also renews his claim (Pet. 23-26) that the evidence was insufficient to show that he shot York. As noted above (see pages 7-8, *supra*), there was ample evidence supporting the jury's verdict. In any event, petitioner's fact-bound sufficiency of the evidence claim does not warrant review by this Court. See *Hamling* v. *United States*, 418 U.S. 87, 124 (1974) ("The primary responsibility for reviewing the sufficiency of the evidence to support a criminal conviction rests with the Court of Appeals").

3. Petitioner challenges (Pet. 26-29) the exclusion of his statement to William Lowe that he had sold the Colt pistol several days before the shooting. See page 4, *supra*. He contends that the statement was admissible under Federal Rule of Evidence 801(d)(1)(B), which provides that a prior out-of-court statement consistent with a witness's trial testimony is not

hearsay if the declarant testifies and is subject to cross-examination concerning the statement at trial, and the prior statement is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.[7] See *Tome* v. *United States*, 115 S. Ct. 696, 701 (1995) ("admissibility under the Rule[] is confined to those statements offered to rebut a charge of 'recent fabrication or improper influence or motive'"). As the court of appeals in this case recognized, "proof of prior consistent statements is not admissible unless and until there has been some impeachment of the witness," *e.g.*, a charge of recent fabrication. Pet. App. 12 (citation omitted); see, *e.g.*, *United States* v. *White*, 11 F.3d 1446, 1450 (8th Cir. 1993) ("a corroborating statement may not be admitted under 801(d)(1)(B) until the declarant's testimony at trial has been challenged"); *United States* v. *Asher*, 854 F.2d 1483, 1499 (3d Cir. 1988) ("absent any charge of recent fabrication or improper influence or motive, a prior consistent statement is inadmissible"), cert. denied, 488 U.S. 1029 (1989).

Petitioner contends (Pet. 28) that the court of appeals in this case interpreted the Rule to require an "express impeachment" in the form of cross-examination, and that its analysis conflicts with

---

[7] Rule 801(d)(1)(B) provides that a statement is not hearsay if

> [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is * * * (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.

decisions holding that a party's "entire theory of the case" may create the requisite impeachment, even before the witness is subjected to cross-examination. Petitioner relies on *United States* v. *Gonzalez*, 700 F.2d 196, 202 (5th Cir. 1983), which held that a defendant's prior consistent statements were admissible during his direct examination "[b]ecause the implication of the government's evidence [in its case-in-chief] necessarily was that [he] had fabricated his defense of lack of criminal intent."

The decision below does not present a square conflict with *Gonzalez*. The court in *Gonzalez* determined that the government's case-in-chief supplied the requisite impeachment in the circumstances of that case, but it did not hold that the government's case-in-chief *always* supplies the impeachment required by Rule 801(d)(1)(B). Such a holding would effectively eliminate the impeachment requirement whenever a defendant takes the stand to proclaim his innocence. Conversely, the court of appeals in the instant case did not hold that the government's case-in-chief may *never* supply the required impeachment; nor has the Fourth Circuit or any other court of appeals squarely so held. See Jean F. Rydstrom, Annotation, *Effect of Rule 801(d)(1)(B) of the Federal Rules of Evidence Upon the Admissibility of a Witness' Prior Consistent Statement*, 47 A.L.R. Fed. 639, 651 (1980). But cf. *United States* v. *Azure*, 801 F.2d 336, 342 (8th Cir. 1986) (prior consistent statement "was only admissible as such after [the witness] had been impeached on cross-examination").

In most cases, the question "whether there has been a charge of recent fabrication" under Rule 801(d)(1)(B) "involves much discretion on the part of the district judge." *United States* v. *Montague*, 958

F.2d 1094, 1098 (D.C. Cir. 1992). That is especially true where, as here, the alleged charge of recent fabrication depends on the government's entire "theory of the case." Thus, petitioner's claim reduces to a disagreement with the court of appeals' conclusion that the government's case-in-chief did not, by itself, establish the charge of recent fabrication required by the Rule. That fact-bound claim does not merit this Court's review.[8]

In any event, this case is not an appropriate vehicle for resolving any tension in the circuits. As the court of appeals noted (Pet. App. 11), petitioner did not invoke Rule 801(d)(1)(B) at trial. That omission is particularly significant in light of the discretionary nature of admissibility determinations under that Rule. Moreover, petitioner did not squarely present his "theory of the case" argument even to the court of appeals. See Pet. C.A. Br. 32-33; Pet. C.A. Reply Br. 16-18. Finally, because petitioner was able to present similar testimony through other means, see Pet. App. 12-13; pages 5-6, *supra*, he would not be entitled to relief even if the district court had erred.[9]

---

[8] Petitioner also claims (Pet. 28) that the decision below conflicts with *United States* v. *Casoni*, 950 F.2d 893 (3d Cir. 1991). In *Casoni*, however, the government witness's prior consistent statements were admitted only after he was cross-examined on the theory that "he had fabricated his testimony to implicate [the defendants] in order to gain immunity for himself." *Id.* at 898.

[9] Petitioner also renews his claim (Pet. 29-32) that the district court erred in excluding Starkey's statement that he had bought petitioner's pistol before the shooting. Both courts below concluded that "corroborating circumstances [did not] clearly indicate the trustworthiness of [Starkey's] statement," as required by Federal Rule of Evidence 804(b)(3). There is no basis for further review of that fact-bound conclusion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
DAVID S. KRIS
Attorney

JULY 1996